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though in form upon a promissory note, was in fact brought to test the power of the Common Pleas of Philadelphia, to vacate, on the ground of fraud, a decree of divorce which it had granted at a previous term. This was the main question before the Supreme Court, and it was decided in the affirmative, in a very able opinion; the conclusions of which are, to some extent, adverse to those of Greene *vs.* Greene. Allen *vs.* Maclellan, is a strong case, for there, the party obtaining the divorce had subsequently married again, and had a child. We make this rectification, however, with the greatest respect for the learned court which decided the principal case, and without any intention of questioning the propriety of its decision.—*Eds. L. Reg.*

District Court, Hamilton County, Ohio—April, 1855.

ALFRED STUNT *vs.* THE STEAMBOAT OHIO.[1]

1. The provision of the Constitution of the United States expressly conferring appellate jurisdiction on the Supreme Court, does not authorize the exercise of appellate power by that tribunal, over the State courts, but extends simply to appeals from the subordinate federal courts.
2. There is no provision in the Constitution, from which a supervising power in the Supreme Court of the United States over the State courts, can be derived by way of *incident* or *implication.*
3. The Supreme Court of the United States has not been constituted the exclusive tribunal of last resort, to determine all controversies in relation to conflicts of authority between the federal government and the several States of the Union.
4. The State courts and the federal courts are *co-ordinate* tribunals, having concurrent jurisdiction in numerous cases, but neither having a supervising power over the other; and where the jurisdiction is concurrent, the decision of that court, or rather, of the courts of that judicial system in which the jurisdiction first attaches, is final and conclusive as to the parties.

MR. JUSTICE BARTLEY delivered the opinion of the Court:

This cause comes before us, at this time, on a motion to make an entry on our journals by an order of court, certifying that on the trial of the cause, the validity of a statute of the State of Ohio, under the authority of which the suit was prosecuted, was drawn in question, on the ground of its being repugnant to the constitution and laws of the United States; that the decision of this question

[1] Before Mr. Justice BARTLEY, of the Supreme Court, and Judges PARKER, CARTER and VAN HAMM, of the Common Pleas.

became necessary in the determination of the case; that it was decided in favor of the validity of the said law; and that this is the highest court of law and equity in the State, in which the parties can, as a matter of right, have the case decided. This entry is asked in order to lay the foundation for the removal of the cause by way of appeal to the Supreme Court of the United States.

The suit was instituted under the authority of the statute of this State for the collection of claims against steamboats and other watercrafts, and authorizing proceedings against the same by name, by which it is provided, that steamboats and other watercrafts shall be liable for debts contracted on account thereof, for materials, labor, &c., in the building or repairing of the same; and also, among other causes of action, for any damage or injury done by the captain, mate, or other officer thereof, to any person who may be a passenger or hand on such boat or craft, at the time. The plaintiff complains of an injury and damage done to him on board the defendant, by the mate, an officer thereof, on the waters of the Ohio river, out of this State, and while the boat was within the borders of the State of Indiana, and sailing under the authority of a coasting license from the United States.

Some years ago the validity of this State law was questioned, on the ground of an alleged conflict with the clause of the second section of the third article of the Constitution of the United States, which provides that the judicial power of the United States, among other cases, "shall extend to all cases of admiralty and maritime jurisdiction." And the judiciary act passed by Congress in 1789, provides that the District Courts of the United States shall be invested with "*exclusive cognizance of all civil causes of admiralty and maritime jurisdiction.*" It was adjudged, however, by the Supreme Court of this State, in the case of *Thompson* vs. *Steamboat Julius D. Morton*, 2 Ohio S. Rep. 26, that this State law was not unconstitutional; that it was competent for a State to authorize a concurrent remedy by proceeding at common law, or by statute, over causes of civil action within its jurisdiction, which constitute grounds for proceeding in admiralty, in the federal courts; and that the *exclusive* and original cognizance of all civil causes of

admiralty and maritime jurisdiction conferred on the District Courts of the United States was to be construed as EXCLUSIVE *only* as between the District and the Circuit and other courts of the United States. And this is understood to be in accordance with the doctrine laid down by the Supreme Court of the United States, in the case of *The Genesee Chief* vs. *Fitz Hugh et al.*, 12 Howard, 124. And the correctness of these decisions is conceded by the counsel making the motion now before us. But the validity of the law is now questioned upon another and different ground. It is insisted that the tort for which the plaintiff brought this suit, is one for which the owner of the boat would not be liable in a proceeding *in personam* against him; and that to subject his boat to the satisfaction of the liability of the officer for his wrong, would be taking the property of one person to discharge the liability of another, and therefore, a violation of the constitutional guaranty of the inviolability of private property; and that especially, this could not be done for a tort committed on the boat while within the jurisdiction of another State, and while engaged in the coasting trade under a license and enrollment, pursuant to the revenue laws of the United States. And it is insisted that this question, although it turns mainly on the construction to be given to the constitution and statute of Ohio, is an appropriate one for the determination of the Supreme Court of the United States.

The first question which arises on this motion, is whether the Supreme Court of the United States can exercise any supervisory control by way of appeal or writ of error, over the adjudications of a State court. If no such appellate power exists, we can have no authority for making the entry requested, and it would be improper to do so. It is said that the Supreme Court of the United States has entertained appeals from this court, and also from the Supreme Courts of the other States, on a similar entry, in cases of recent occurrence involving the question of the validity of the laws of this State taxing the property of banks. The entries made in the Supreme Court of the State in the bank tax cases, which were removed to the Supreme Court of the United States, were entries drawn up and made by the consent and agreement of the

parties. But the fact that the Supreme Court of the United States would entertain the appeal from this court upon the certificate proposed, is not conclusive on the question before us. The existence of such appellate power by the authority of the Constitution, is necessary to warrant the record of such an entry in this court, and, therefore, a matter to be passed upon by us on the motion under consideration. The decision of the Supreme Court of the United States in favor of its own power, is entitled to great respect; but, however high the consideration due the decisions of that tribunal, they cannot be above the reach of respectful examination and inquiry into the reasons and authority upon which they rest, when brought under review in the determination of a matter imposing the duty of judicial action in a State court.

The question of the appellate power of the Supreme Court of the United States over the State courts, has recently acquired an importance of great and vital interest in this State. In the exercise of this appellate power, that tribunal has recently assumed to reverse the judgment of the Supreme Court of Ohio, and annul a State law, by declaring it unconstitutional, on a mere question of the judicial construction to be given to the constitution and statutes of the State; and that, too, in regard to a matter relating solely to the local revenues of the State, and in nowise whatsoever, affecting the interests or due administration of the general government. (See *State Bank of Ohio* vs. *Knoop*, 16 *How.* 369.) And under this decision some fifty banking corporations in this State, with an aggregate amount of taxable property exceeding twenty millions of dollars, are, at this time, claiming exemption from the taxing power of the State, and successfully resisting the authority of the State to exact an equal and just tribute of taxation from them. The increasing and fearful interest and importance of the question of the appellate power of the Supreme Court of the United States over the State courts, has become such as to require the most profound consideration. And as it is fairly and fully presented on the motion before us, we feel no disposition to shrink from the responsibility of meeting it *fairly* and *fully*. And inasmuch as this appellate power is claimed upon the ground of great

weight of authority, we deem it not inappropriate, and indeed, no less than a duty in expressing an opinion on it, to give the subject a *full, searching* and *thorough* examination.

Does the Constitution confer any power on the federal government, by which the Supreme Court of the United States is authorized, in the exercise of its appellate jurisdiction, to review and reverse the judgment of a State court?

It cannot be pretended that Congress can confer this power by statute, without a delegation of authority in the constitution. Under our system of government, a law originating in an exercise of power not given by the constitution, is void. The United States is a government of expressly defined and limited powers, and all powers not delegated in the constitution, are expressly reserved. It would be to little purpose, indeed, that the people should expressly define and limit the powers of their government by a written constitution, if the limits prescribed could be passed by those intended to be retained, and laws enacted without authority derived from the constitution. "This doctrine," (in the language of Chief Justice Marshall, in the case of *Mar ury* vs. *Madison*, 1 Cranch, 137,) would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is preseribing limits, and declaring that those limits may be passed at pleasure; and thus reducing to nothing what we have deemed the greatest improvement on political institutions—"a written constitution." It is incontestible, therefore, that if this power be not conferred by the constitution, it cannot be legitimately exercised.

We may here premise, that it is a settled rule of interpretation, founded on sound reason, that every written instrument conferring limited and expressly defined powers must be strictly construed; and that to warrant the exercise of special authority thus delegated,

the grant of it, must appear *affirmatively* and *distinctively* to be within the terms of the prescribed limits. If this rule be important in any instance, it is so in its application to the written constitution of a government of limited and expressly defined powers. If the exercise of doubtful authority, derived by vague and far-fetched construction and implication, be warranted or allowed, a written constitution will be of but little consequence as a restraint upon ambition and cupidity. The rigid application of the strict rule of construction above mentioned, is also authoritatively required by the ninth and tenth additional amendatory articles of the constitution, declaring that the powers not expressly delegated, are reserved, and that the enumeration of certain rights in the constitution shall not be construed to deny or disparage those retained. Without this express requirement of a strict construction, the constitution would not have been adopted by the states.

Bearing in mind, therefore, this rule of interpretation, we will proceed directly to an examination of the question under consideration.

The whole judicial power of the federal government is conferred by the third article of the Constitution. The first section of this article prescribes the courts in which this judicial power is vested, in the words following:

"The *judicial power* of the United States *shall be vested* in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

The second clause of the second section of the article, distributes the jurisdiction under which this judicial power is to be exercised as follows:

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have *original* jurisdiction. In all the other cases before mentioned, the Supreme Court shall have *appellate* jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

These two provisions contained in the same article, and closely connected in their relation to the same subject matter, must be

construed together. The whole jurisdiction conferred is vested in the Supreme court of the United States, and the inferior courts established by Congress. None of the judicial power of the United States, therefore, can be exercised by any other courts than the courts of the United States. No other courts but these are mentioned in this article; and clearly none other could have been in contemplation. In a few specified cases only, is *original* jurisdiction given to the Supreme court; as to all other cases, the jurisdiction of that court is *appellate.* An appeal is the removal of a suit from the determination of an inferior court, to the jurisdiction of a superior court under the same judicial system. It is a continuation of the same suit under the judicial power of the same government, but under the jurisdiction of a higher court, than that in which it has been once decided. *Appellate jurisdiction* is the cognizance which a superior court takes of a case removed to it, by appeal or writ of error from the decision of an inferior tribunal. The power of the appellate court necessarily includes the power not only to reverse the judgment, but also to control and direct the subsequent action of the subordinate court. Appellate jurisdiction, therefore, always implies the existence of subordinate courts in the same judicial organization, over which the court in which it is vested exercises a supervising or correcting control. The appellate jurisdiction, which is here vested in the Supreme Court of the United States, is conferred in the same constitutional provision which authorizes the establishment of the inferior federal courts, as well as the Supreme Court; and of course has a direct reference to appeals from the inferior federal courts, being the subordinate courts under the same judicial organization. No other courts than the United States courts are mentioned, or even alluded to in this article of the Constitution; and none other could have been contemplated. This constitutional provision is the fundamental law for the organization of a judicial system. It vests all the judicial power of the government in a Supreme Court, and certain inferior courts belonging to this judicial organization. No other judicial system is mentioned. The constitution contains no provision creating any connection between this and any other judicial organi-

zation. When therefore, this constitutional provision distributes the judicial power of this system, by vesting appellate jurisdiction in the Supreme Court, it would be a gross absurdity to say, that this appellate jurisdiction could have reference to anything else than appeals from the inferior tribunals here mentioned as belonging to the same system, and which are essential to make up the organization of the courts in which the whole judicial power of the United States is vested.

Where a constitution organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislative branch of the government may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the Supreme Court, and to confer upon it appellate jurisdiction, the plain import of the words is to confer jurisdiction or a supervising control by appeal or writ of error, over the judgments of the subordinate tribunals here mentioned and established in the same connection, as a part of the same organization. If the appellate jurisdiction here conferred had reference to any other subordinate courts than those mentioned in this provision of the constitution, language would certainly have been used expressly including them. The judicial system of each State is different and distinct from that of the federal government, and ordained and established under a different constitution—originating from a different source, and distinct in its organization, it is clothed with independent judicial power derived from the people of the State, and wholly distinct from the judicial power of the United States. If the appellate jurisdiction conferred on the Supreme Court of the United States had reference to the removal of cases by writ of error or appeal from the State courts, as well as the inferior federal courts, it is *fair* to infer that the express mention of them would not have been omitted; and the State courts not having been mentioned as subject to this appellate power, they are excluded by a well settled and universal rule of interpretation. Each of the States has always claimed to be sovereign and independent, and at the time of the formation of the Constitution of the United States, each State was especially jealous of encroachments

on its State sovereignty by the powers delegated to the federal government. It is certainly by no fair or reasonable mode of interpretation, that the language of the constitutional provision above recited, could make the courts of the States subject to the supervising control or the appellate power of the Supreme Court of the United States, without the mention of them, or language clearly and expressly including them.

But it has been argued, that the language of the Constitution conferring appellate jurisdiction on the Supreme Court of the United States, is not expressly limited by reference to any particular subordinate courts, but general and restrained only by "such exceptions and such regulations as the Congress shall make;" and that therefore, the language of the Constitution does not limit this appellate power to the inferior federal courts. This argument overlooks one of the plainest and most common rules of interpretation. The language of every instrument must be construed with reference to the *connection* in which it is used, and the *context and subject matter* to which it relates. The article of the constitution in which this appellate jurisdiction is conferred, establishes a separate, distinct and independent judicial system, vests the whole judicial power of the federal government in the federal courts, provides for a Supreme Court and the inferior courts of the system, and in the distribution of the jurisdiction, confers *appellate* jurisdiction on the Supreme Court. Was it necessary to say in so many words that the appellate jurisdiction here conferred applied only to proceedings in the subordinate tribunals here mentioned and provided for,—the tribunals belonging to the judicial organization in this connection established,—tribunals exercising judicial power here conferred, a part of which, and indeed a *mere continuation* of which, after the commencement of its original exercise, *is the appellate jurisdiction* under consideration? It is clear that words specifically applying this appellate jurisdiction to the proceedings of these subordinate courts of the same organization, could not have made this constitutional provision plainer than it is. No other courts or judicial system is in any manner referred to or even recognized as having an existence. This grant of appellate jurisdiction, therefore, taken

in the connection in which it stands, has as plain and clear an application to the supervising control over the subordinate federal courts alone as express language could make. Such is the fair and reasonable import of the whole article; and any other construction would not only violate a settled rule of interpretation, but be at variance with reason and plain common sense.

The constitutional provisions for the establishment of the several judicial systems for a number of the States, furnish practical illustrations of the interpretation here given to the Constitution of the United States. The first section of the fourth article, in the Constitution of Ohio, is as follows:

"The judicial power of the State shall be vested in a Supreme Court, in District Courts, Courts of Common Pleas, Courts of Probate, Justices of the Peace, and in such other courts, inferior to the Supreme Court, in one or more counties, as the General Assembly may from time to time establish."

The second section of the same article, continues:

"The Supreme Court shall consist of five judges, a majority of whom shall be necessary to form a quorum, or to pronounce a decision. It shall have original jurisdiction in quo warranto, mandamus, habeas corpus, and procedendo, *and such other appellate jurisdiction as may be provided by law.*

Here a Supreme Court and certain subordinate courts are created, and in the distribution of the judicial power, *appellate jurisdiction* is conferred on the Supreme Court *in general terms*, without expressly mentioning the subordinate courts over whose proceedings it shall be exercised. The provision here is substantially the same with that in the Constitution of the United States, in regard to the appellate jurisdiction. But did any one ever doubt as to the subordinate courts to which the appellate jurisdiction here conferred was applicable? Was it ever supposed, that it could be extended beyond the subordinate courts mentioned in the same connection and authorized under the same judicial system? What would be said of a legislative enactment in Ohio authorizing an appeal, or writ of error from the subordinate federal courts sitting within the State, to the Supreme Court of the State? Would the Supreme Court of the United States,—a tribunal which has never been wanting in a disposition at least, to protect, to the utmost extent, the powers of the federal

judiciary,—acquiesce in such an interpretation of the Constitution of Ohio? It certainly would not. And yet the language of the Constitution of the State, and the relation of the State to the federal government, would justify such an interpretation and sustain such appellate power in the State court, upsn the very same ground upon which this appellate power claimed for the Supreme Court ef the United States rests.

The judicial system of each State is entirely distinct from that of the federal government, and the judicial power of the federal government being wholly distinct from the judicial power of each State, it cannot be blended with it. All the judicial power vested in the federal government, must, from the very nature of the grant, be original, or capable of original cognizance of any case commenced under it. Without *original*, there can be no *appellate* jurisdiction. The latter is a mere continuation of the judicial power originally acquired or taken over the rights of the parties in a suit. The authority given to Congress to ordain and establish inferior courts, to any extent deemed proper, was evidently intended to enable the federal government, to provide subordinate tribunals in each of the States, competent to take original cognizance of all matters of federal jurisdiction within its limits, so far as the same might become necessary. The state courts were not relied on as means of exercising any of the judicial power of the United States, and no portion of it was vested in them by the Constitution of the United States. It has been settled by solemn adjudication, that Congress cannot, by law, impose jurisdiction on the State courts, nor can the legislature of a state impose jurisdiction on the United States courts. The exercise of appellate jurisdiction, therefore, by the Supreme Court of the United States over the State courts, is not only not provided for in the Constitution, but incompatible with the theory of our government, and the distribution of power under it. Hence the express provision in the Constitution, that "*the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may ordain and establish,*"—thus confining the judicial power of the federal government to the federal courts, by express provision.

But it is insisted that the power of the Supreme Court of the United States, to control the judgments of the State courts, is acquired by virtue of the first clause of the second section of the third article of the Constitution, which is in these words:

"The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affectiug ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof, and foreign States, citizens or subjects."

The effect of this provision, is not to *confer appellate jurisdiction*, but to *define the objects, and limit the extent* of the judicial power of the United States. The judicial power mentioned, is of course the judicial power of the United States as distinguished from that of the several States; and it is *extended* only to the subjects specifically enumerated; so that the federal courts are cousts of *limited*, and not courts of *general* jurisdiction. Their jurisdiction is to "*extend* to all cases arising out of the several matters specifically enumerated. There is no expression used to give the judicial power here conferred, any *exclnsive* character. The term "*extend*" means to stretch, reach, or continue in any particular direction, (Webster's Dictionary.) There is no meaning in the word "*extend*," which carries with it the *exclusion* of any thing else extending to the same matter. It is in the nature of the jurisdiction of courts of justice, that it never operates, till it is invoked by the institution of a suit, or other proceeding in court. When, therofore, the judicial power is *extended* to any particular subject, it is simply empowered to take jurisdiction over it, whenever it is invoked by the commencement ef a suit or other proceeding. Had the phraseology of the constitution been as follows: *the courts of the United States shall have jurisdiction in all cases brought before them, touching the several matters mentioned*, instead of the language used, it is very clear, that the same, and no different meaning would have been expressed. The State courts are not mentioned nor referred to,

nor do they appear to have been in contemplation, from any language used. The bare *extension* of the judicial power to all cases, or which is the same thing, to all suits or proceedings which may be instituted invoking its action, touching the enumerated subjects, does not give any *exclusive* character to the power granted, so as to exclude the concurrent jurisdiction of co-ordinate tribunals.

The object of a written constitution is to enumerate and distinctly describe the power delegated by the people to the government, so that they may not be left matters of doubt or conjecture. Had it been the intention of the Constitution to exclude the concurrent jurisdiction of the State courts in the cases to which the judicial power of the United States is *extended*, language would certainly have been used, clearly manifesting such intention. But as no such words are employed, and all powers not expressly conferred are reserved by the very terms of the Constitution, it is plain and certain that no such *exclusive* jurisdiction is given by the Constitution, to the federal courts.

Much hypercriticism has been expended on the words "*all cases in law and equity, arising under the Constitution, laws and treaties of the United States,*" to which the federal jurisdiction is *extended.* There is no occasion for any strained interpretation, or search for far-fetched meaning to ascertain the plain import of the language used. What constitutes "*a case*" in law or equity, arising under the Constitution, &c., is matter of legal interpretation. *A case* in law or equity is a suit or proceeding in court, invoking the exercise of judicial power, and consisting as well of the parties as of their rights. There is a manifest distinction between a *question in law or equity*, and *a case in law or equity.* Although every *case* in law or equity involves a *question*, yet many questions may arise seriously affecting the rights of persons, which do not constitute a CASE in law or equity. It appears that Chief Justice Marshall, when a member of Congress, in a debate in relation to the famous case of Jonathan Robbins, gave an exposition of the term "*a case in law,*" as used in the Constitution, in the following words:

"By the Constitution, the judicial power of the United States is extended to *all cases* in law and equity arising under the constitution, laws and treaties of the Uni-

ted States; but the resolutions declare the judicial power to extend to *all questions* arising under the constitution, laws and treaties of the United States. The difference between the constitution and the resolutions was material and apparent. *A case in law or equity was a term well understood, and of* LIMITED SIGNIFICATION. It was a controversy between parties that had taken a shape for judicial decision. If the judicial power extended to every *question* under the constitution, it would involve almost every subject proper for legislative discussion and decision: if to every *question* under the laws and treaties of the United States, it would involve almost every subject upon which the executive could act. The division of power, which the gentleman had said could exist no longer, and the *other departments, would be swallowed up by the judiciary.* By extending the judicial power to all cases in law and equity, the constitution had never been understood to cŏnfer upon that department any political power whatever. To come within this description, a *question* must assume a legal form for forensic litigation and judicial decision. *There must be parties to come into court, who can be reached by its process, and bound by its power;* whose rights admit of ultimate decision by a tribunal to which they are bound to submit." 5 Wheat. Rep. Appendix.

This interpretation is unquestionable. *Cases* in law and equity within the meaning of the Constitution, therefore, are suits or proceedings in court requiring the exercise of judicial power. And as this article of the Constitution refers to and has in view no courts but the federal tribunals, it is manifest that the language "*the cases in law and equity* arising under the Constitution, laws and treaties of the United States," comprehends only *suits or proceedings instituted in the federal courts*, invoking the exercise of the judicial power of the United States. The Constitution does not say that the judicial power shall extend to *all questions* arising under the Constitution, laws and treaties of the United States. The idea that the judicial power of the United States extends to *every question* arising under the Constitution, laws and treaties of the United States, is not only an absurdity, but an impracticability.

The judicial power acts only when its operation is invoked; and its action is invoked only by a case or suit instituted under its jurisdiction. It is not possible, therefore, for the judicial power to take cognizance of any question, except where a suit or judicial proceeding has been instituted under its jurisdiction, calling it into operation. *A case*, therefore, within the meaning of the Constitution, and to which the judicial power of the United States *extends*, must

be, first, a suit or judicial proceeding instituted under the authority of the federal constitution, invoking the action of the judicial power of the United States; and, second, it must involve a question, or relate to a subject matter pertaining to the Constitution, laws or treaties of the United States, or involve one of the other elements of federal jurisdiction, specified in the Constitution. Such would be a *case* arising under the Constitution of the United States; and to *all such cases, and none others,* is the judicial power of the United States *extended.*

There is, therefore, no foundation for the doctrine that the first clause of the second section of this article of the Constitution confers an *exclusive* jurisdiction on the federal courts over *all questions* arising under the Constitution, laws and treaties of the United States. And the very claim to appellate jurisdiction in the Supreme Court of the United States from the State courts, over cases involving these subjects, for adjudication, is an admission that the State courts may take cognizance of, and determine these questions, and that the jurisdiction of the federal courts over them is not *exclusive.* So that it cannot be claimed that the language of the Constitution *extending* the judicial power of the United States to *all cases* arising under the Constitution, laws and treaties of the United States, is *exclusive.*

It is insisted, however, that the State courts, as to these questions, are courts of inferior jurisdiction to the federal tribunals, and that, therefore, appellate jurisdiction as to them from the State courts, may be given to the federal courts. But, as has already been shown, the *appellate jurisdiction* of the Supreme Court of the United States, is expressly defined by the second clause of this second section, and *plainly limited* to the supervision of the decisions of the inferior federal courts. And as there is no provision whatever in the constitution, giving the federal courts appellate jurisdiction over the State courts, it follows that, as to these cases, to which the judicial power of the United States is extended, the State courts exercise a jurisdiction, *concurrent* and not *inferior* to that of the federal tribunals. And it is inherent in the nature of

concurrent jurisdiction, that the courts which exercise it are tribunals of co-ordinate and co-equal authority, and neither can control the determinations of the other by the exercise of appellate power; but the adjudication of the court in which the jurisdiction first attaches, is conclusive and final. This is a fair deduction from the provisions in both the State and the Federal Constitutions. The jurisdiction of the State courts is admitted, and the judicial power of the United States is extended to the enumerated cases, but by no language which makes it *exclusive*. It follows that the jurisdiction of each is *concurrent*, and there is nothing in the constitntion giving either appellate control over the other. Appellate jurisdiction by either over the other, would be fundamentally incompatible with the theory and structure of our system of government.

As nothing can be found in the third article of the Constitution which provides the organic law for the judicial system of the United States, authorizing the exercise of appellate jurisdiction by the federal courts over the State courts, can it be pretended that this extraordinary power can be derived from any other part of the Constitution? There is no provision in the succeeding fourth, fifth, sixth and seventh articles, even remotely bearing upon it; nor is there anything in the second article which defines the powers of the executive department, in any way relating to the subject. And certainly there is nothing to be found among the enumerated powers of Congress, in the first article, to warrant Congress in clothing the federal courts with any such authority. The eighth section of this article, containing the specific enumeration of the powers of Congress, authorizes Congress to establish courts inferior to the Supreme Court; but there is nothing empowering Congress to authorize appeals from the State courts to the Supreme Court, or to exercise any authority whatever over the State courts. The first clause of this section eonfers the power "to lay and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defence and general welfare of the United States." The authority here given to raise revenue with a view to pay debts

and provide for the common defence and general welfare, clearly contains no grant of judicial power. The most latitudinarian construction heretofore given to the constitution, has not conceded to Congress general discretionary power to pass laws providing for the general welfare. On the contrary, it appears to be settled that this authority of Congress to provide for the common defence and general welfare, has relation to the enumerated powers, and can be exercised only pursuant to, and in the execution of the express powers granted and specifically enumerated.

Where, then, is the authority in the constitution for this appellate power? Can it be found among the implied powers of the government? The eighteenth clause of the eighth section, article 1, empowers Congress "to make all laws which shall be *necessary* and *proper* for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." This is express authority for the exercise of the *incidental powers*, and having relation to the express powers, can only be exercised pursuant to them. It authorizes the enactment of all laws "*proper* and *necessary*" for the execution of the express powers vested in the several departments of the government. Now, as the *express power* giving the Supreme Court of the United States *appellate jurisdiction*, is that which is contained in the third article of the constitution, and has relation only to appeals from the inferior federal tribunals, it follows that the incidental or implied power in relation thereto, is limited to *necessary* and *proper* laws relating to appeals from the inferior federal courts to the Supreme Court, and nothing more.

The second clause of the sixth article of the constitution, declaring the constitution, laws and treaties of the United States, the supreme law of the land, has been urged in support of the alleged supremacy of the judicial power of the United States over the State courts. This clause, however, is merely *declaratory*, and vests no specific power whatever in the government, or any of its departments. No one questions the supremacy of the constitu-

tion, laws and treaties of the federal government. This supremacy is not, however, absolute, and is limited to the sphere of the delegated powers of the federal compact. And the State courts are bound to observe this supremacy in all matters judicially brought before them, as well as the federal courts. This supremacy, therefore, imposes *subjection* to the constitution, laws and treaties of the United States, but not *subjection to the federal courts.* The constitution and statutes of each State is the *supreme law of the land* within the sphere of the State authority; while the constitution, laws and treaties of the United States, are the supreme law of the land within their appropriate operation. But how can this mere declaratory provision authorize appellate jurisdiction in the federal courts over the State tribunals? The very clause of the constitution which contains it, requires that the judges of every State shall be bound by the constitution, laws and treaties of the United States, as the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. And the succeeding clause of the same article requires of the judicial officers of the several States, together with other officers, an official oath to support the Constitution of the United States. Although the official oath of the federal officers requires the same thing, yet, it does not enjoin upon them the duty of supporting the constitution of the several states. Not only, therefore, is no distrust in the State judiciary shown by the constitution, but the fidelity required by the oath of office, implies that the determination of matters pertaining to the federal constitution, laws, &c., might occur in the State courts, as well as in the federal courts. And if a revising or controlling power over the State courts, in this respect, by the federal courts, had been contemplated, it would undoubtedly have been expressly and distinctly delegated. But this not having been done, the judicial officers of the several States as well as the federal officers, are required, under the injunction of an official oath, to observe and support the constitution, laws and treaties of the United States, as the supreme law of the land.

The existence of appellate power in the Supreme Court of the

United States over the State courts, has been argued from its tendency to produce uniformity of decision, and prevent conflict between the adjudications of the State and the federal tribunals. This argument is founded on the supposed *utility* or *beneficial tendency* of such a power. It is an argument in favor, rather of the propriety and policy of the power, than of its existence; and would be more appropriate on a political question before a convention or legislative assembly, than on a legal question before a court of justice. The judicial question before us, is a mere question of interpretation; and is to be determined from the language of the constitution, by an application of the known and settled rules of judicial construction. The duty of judicial action does not go beyond this. But it is to be lamented, that the political bearing of questions of mere constitutional interpretation in our courts, has been heretofore, a source of too frequent error in this country, leading to determinations making the constitution by construction, what the judges *wish* it to be, or what they think *it ought to be*, rather than what *it actually is*.

The alledged salutary tendency of this appellate power for the purpose of uniformity of decision, has been greatly exaggerated, and made a mere *pretence* to justify the power in question. For that uniformity is not in fact *attained*, or in *good faith* attempted by the 25th section of the judiciary act of the Congress of 1789. That act authorizes the appeal in cases, where the uniformity of decision may exist, and denies it in cases where the uniformity may not exist. It is only where the decision is in favor of the authority of the State, or against the power of the federal government, that the appeal is authorized. When, therefore the State court has decided in favor of the validity of a State law, on the ground that it is not repugnant to the Constitution of the United States, and the Supreme Court of the United States, either, has already decided, or would decide in favor of the validity of the law, there is *uniformity* of decision, and yet, the appeal in such a case is allowed. On the other hand, where the State court decides against the validity of a State law, and the federal court, either, has already decided, or

would decide in favor of the validity of the law, there is *want of uniformity;* and yet, in that case, the appeal is denied. Uniformity of decision, is, it would appear, a matter of no importance, providing the decision of the State court be in favor of the authority of the federal government. But where the State court decides to sustain the validity of a State law, there the want of uniformity will justify the federal court in reversing the judgment of the State court! The enormity of this solicism is made even more glaring by the fact, that the judges of the federal courts, are under no official oath to support the constitutions of the several States, against the authority of which, they are allowed to decide, while the judges of the State courts are placed under the solemnity of that official injunction, to support the constitution of the United States, as well as that of their State. Yet notwithstanding this, the decision of the court of last resort in a State, is, according to this law of Congress, presumed to be *right*, and therefore *final*, if it be against the authority of the State, and in favor of that of the United States, but if the decision be to the contrary, it is presumed to be liable to error, and therefore, subject to revision and reversal in the federal court. This presents the monstrous absurdity in judicial action, of making the judgment of a court of justice *final* or *not* according to the party in whose favor it may happen to have been rendered, of making a court, the court of *last resort or not* in the determination of a cause, according as it may be decided in favor of one or the other of the parties. This novel and extraordinary feature in the judicial system of the United States, is founded on a want of confidence in the integrity and fidelity of the State courts, and only admits that they are to be trusted as *impartial*, when they decide in a particular way, in other words, in favor of the power of the general government. The manifest effect of this incongruity, is to aggrandize the federal government at the expense of the degradation of that of the several States.

Upon no ground whatever can uniformity of decision be urged as an argument in favor of the existence of this appellate power. The courts of this country are prone to follow precedents, and

sometimes, even go too far, for the sake of uniformity of decision. Notwithstanding this, there is often as much want of uniformity in the various decisions of the same court, as is to be found between the decisions of the courts of the different States, or between the decisions of the State and the Federal courts.

And there can be no conflict of authority between courts of concurrent jurisdiction, as it is settled that, as between courts of concurrent jurisdiction, the adjudication of the court in which the jurisdiction first attaches, is final and conclusive upon the parties. And in all cases of concurrent jurisdiction in different courts, the plaintiff selects the tribunal in which to bring his suit; and having selected his tribunal, he should abide by the decision. Nor has the defendant any right to complain in such case, and have another trial in the federal courts, when the decision of the State court is against him. Whether he be a citizen, or mere non-resident or sojourner in the State, he is bound to acquiesce in the decisions of its tribunals, having subjected himself to this liability by voluntarily putting himself under the protection of its laws.

It has been argued in favor of this appellate power, that appeals were allowed from the State courts to the courts established by Congress, under the Articles of Confederation of 1778, an instrument which, as it has been said, encroached far less on the sovereignty of the States than the present constitution. The foundation of this, as an argument drawn from analogy, when accurately understood, is in reality *against*, instead of being *in favor* of the existence of this power under the present constitution. The only provision in relation to the exercise of judicial power, contained in the Articles of Confederation, is the following, in article ninth: "The United States, in Congress assembled, shall have the *sole and exclusive right and power* of appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for receiving and determining finally appeals *in all cases of captures.*" The judicial power here given, over piracies and felonies upon the high seas, is "*sole and exclusive.*" So also, is the power

of establishing appellate courts of dernier resort for the final determination of all cases of captures "*sole and exclusive.*" *Some such language as this* would have been used in the Constitution of the United States, had it been the intention to give to the federal courts *exclusive* jurisdiction over, or the *exclusive final* determination of, the various *cases* to which the judicial power of the United States was *extended.*

This provision, however, in the Articles of Confederation, affords no ground for argument founded on precedent or analogy, in favor of this appellate power over the State courts. The relation of the States to the authorities under the confederation, was essentially different from that of the States to the federal government. Under the Constitution of the United States, the federal government is a distinct and independent government, to which the several States stand in the relation of distinct, equal, and co-ordinate powers. But the confederation did not, in reality, possess the essential elements of a distinct government. The only distinct branch of government established by it was the Congress, and that was greatly dependent on the States. The confederation was a mere alliance of the States for common defence, and certain general regulations respecting their foreign relations, commercial affairs, &c. It was not a distinct government, in and of itself, but a mere agency of the States, exercising their confederated authority. No distinct judicial system was, in fact, established by the confederation; no superior and subordinate courts authorized, and no distribution of jurisdiction provided for. So that, no precedent or analogy whatever is to be found here, for this supervisory control over the State courts.

It has been said that this appellate power of the Supreme Court of the United States is sustained by *contemporaneous construction* of the constitution. This is, however, *chiefly* founded on the opinion expressed in the political work entitled "The Federalist," consisting of a series of articles written by Messrs. Hamilton, Madison, and Jay, over the signature of "Publius." While this work is not entitled to the weight of judicial authority, it is liable to the further objection that it was a newspaper publication, written in the haste

and excitement of a political contest. And although the authors were gentlemen eminently distinguished for ability and patriotism, yet they took part with the political party which in the constitutional convention insisted on an enlargement of the powers of the federal government beyond that which was conceded by the convention in the formation of the constitution. It is a historical fact that the convention which formed the Constitution of the United States was to a considerable extent divided into two parties, one of which insisted on the establishment of a *national* government, with an *absolute negative* on the power of the State governments, while the other insisted on a strictly *federal* government, reserving and securing to the several States their freedom and sovereignty as distinct, equal and co-ordinate governments. On the one side it was urged that the danger to be apprehended was, that the reserved powers of the States would combine and destroy the efficiency of the delegated power; and on the other side, it was strenuously insisted that the danger to be feared was that the delegated powers of the general government would absorb the reserved powers of the States and result in a consolidated government destructive to the sovereignty of the States, and dangerous to the freedom of the people. This division of opinion was manifested in the proceedings of the convention throughout its deliberations, and produced much solicitude and excitement among the people of the several States. Those in the convention in favor of a *national* government were found in the minority; and although they yielded in the convention, and ably advocated the adoption of the constitution, they did not abandon their political views, but sought still to carry them out to some extent by enlarging the powers of the general government by a very liberal, and in some instances a latitudinarian construction of the constitution. The authors of the "Federalist," acting with the party which insisted on giving the greatest strength and energy to the general government, placed that construction on the constitution which tended most to enlarge its powers. It is true, Mr. Madison afterwards somewhat changed his course, united with Mr. Jefferson and his friends, and for a time adopted the strict construction of

the constitution, as appears from his report and resolutions in the legislature of Virginia, in January, 1800.

The articles in the "Federalist," therefore, should be received with many grains of allowance on account of their partizan character. And written in the heat of a political contest, it is not surprising that they are not in all their parts, perfectly consistent.

It is true, that the 82d number of the articles in this work, and which was written by Mr. Hamilton, expresses the opinion that "*the national and the State (judicial) systems are to be regarded as* ONE WHOLE;" and that an appeal lies not only from the State courts to the Supreme Court of the United States, but on the last page of this article he adds, "*I perceive at present no impediment to the establishment of an appeal from the State courts to the subordinate national tribunals, and many advantages attending the power of doing it may be imagined!*" This opinion as expressed is not deduced from a close and satisfactory analysis or interpretation of the language of the constitution. And if it be followed, Congress would have the power, and may, whenever that body deems it proper, make the judgments of the highest courts in the several States subject to revision and reversal in the United States District Court, which is held by a single judge, or in any of the other subordinate courts of the United States. If the doctrine of this work is to be adopted in the construction of the constitution, Congress may pass a law authorizing appeals from any of the courts of a State, even from justices of the peace, to any of the federal tribunals; and the judgments of the Supreme Court or of any of the other courts of a State may be made subject to revision and reversal in any of the subordinate federal tribunals, even in that of a mere commissioner under the federal judiciary, now in the exercise of *judicial power*, notwithstanding he is not appointed by and with the advice and consent of the Senate. If this doctrine be tenable, the constitution has provided no safeguard whatever for the *independence* and *sovereignty* of the States.

In the 81st article of the "Federalist," Mr. Hamilton expresses the opinion, that Congress may confer jurisdiction on the State courts

to try causes arising out of the federal constitution, and adds, in his own words: "*To confer upon the existing courts of the several States the power of determining such causes would perhaps be as much 'to constitute tribunals' as to create new courts with the like power*," &c. How is this to be reconciled with the first section of the third article of the constitution, containing the positive provision that the *judicial power of the United States* shall be *vested* in one Supreme Court, and in *such inferior courts as the Congress may from time to time ordain and establish*, the judges of which courts shall hold their offices *during good behavior*, and at stated times receive for their services a compensation from the United States which shall not be diminished during their continuance in office? Are not the judges of the inferior courts, in whom the judicial power of the United States is authorized to be vested, federal courts *exclusively?* By whom are they to be appointed? From what source are they to receive their salaries? And can their compensation be diminished during their term of office?

As a further instance to show the liberal construction given by Mr. Hamilton to the constitution, it may be added that in his report as Secretary of the Treasury of the United States, of December 5th, 1791, he expressly contends that it belongs to the *discretion* of Congress to pronounce upon the objects which concern the *general welfare*, for which an appropriation of money may be made; and in his own words says, "*there seems to be no room for a doubt, that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the national councils, as far as regards an appropriation of money.*" Such a construction, once conceded, would result in a consolidation of all the controlling civil power and influence in the general government, and a total annihilation of the sovereignty and freedom of the States.

Yet on the fifth page of the 45th article in the "Federalist," the following language is used by Mr. Madison:

"The powers delegated by the proposed constitution to the federal government, are *few* and *defined*. Those which are to remain in the State governments are *nume-*

rous and *indefinite.* The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to *all the objects which*, in the ordinary course of affairs, *concern the lives, liberties and properties of the people;* and the *internal order, improvement,* and *prosperity* of the State." . . . . "If the new constitution be examined with accuracy and candor, it will be found that the change which it proposes, consists much less in the addition of *new powers* to the Union, than in the *invigoration of its original powers.*"

Many pages might be occupied in presenting the conflicting and irreconcilable opinions and speculations of the distinguished authors of this political publication. But more attention has already been given to it than would have been deemed necessary, but for the fact, that it has been greatly relied on as authority, on the subject under consideration, even in the reported opinions of the Supreme Court of the United States.

In further support of this alleged *contemporaneous construction* of the constitution, the opinion of the first Congress which assembled, and by which the judiciary act of 1789 was passed, providing for this appellate power, is sometimes referred to. This is also an authority novel in its character. The very question involved, is that of the constitutionality of the twenty-fifth section of the judiciary act, providing for the exercise of this appellate power. And is this to be determined by the opinion of the legislative body which enacted the law? If this be good authority, every unconstitutional law can sustain itself; for the law itself is an authoritative exposition of the opinion of the august body by which it was enacted. By such authority, the constitutionality of the alien and sedition laws could be sustained, which vested arbitrary and despotic power in the President of the United States, and abridged the freedom of speech and of the press, in plain violation of the constitution; and also the constitutionality of the numerous other acts which have been repealed, and are now repudiated by the force of public sentiment as wholly unwarranted by the constitution.

But it is said that, as the Congress which enacted the Judiciary Act of 1789, was composed of a number of eminent men, who were prominent members of the convention which formed the constitution, the legislative construction thus given to the constitution is entitled to great consideration. This reasoning is in conflict with the principle which has been deemed of vital importance in all free governments, by enlightened writers, including the authors of the "Federalist," *that the power* of making and the *power of expounding a law or constitution should not be given to the same persons.*

No one will deny that the illustrious men who took a leading part in forming our government, are entitled to great credit for ability and patriotism. But it would be a manifestation of imbecility in their descendants, to attribute to them the perfection of wisdom, and an exemption from the ordinary infirmities of humanity. In the establishment of our government, they made an experiment in the science of government, new in theory, and vast and complicated in its operations. They made no pretension themselves that it was perfect, or that they could foresee all the dangers or imperfections incident to its operation, and which time and experience alone could fully make known. Mr. Madison, in the 38th Article in the "Federalist," uses the following language:—"Is it unreasonable to conjecture, that the errors which may be contained in the plan of the convention, are such as have resulted, rather from defect of antecedent experience on this complicated and difficult subject, than from the want of accuracy or care in the investigation of it, and consequently, that they are such as will not be ascertained until an actual trial will point them out? This conjecture is rendered probable, not only by many considerations of a general nature, but by the particular care of the Articles of Confederation. It is observable, that among the numerous objections and amendments suggested by the several States, when these Articles were under consideration, not one is found which alludes to the great and radical error, which on trial has discovered itself!"

The justness of these remarks is fully illustrated by the practical

operation of the system under the constitution, which has fully demonstrated that the opinion of those eminent men who formed the constitution, (and which doubtless led to the adoption of the 25th section of the Judiciary Act,) that the powers of the general government would prove too weak to resist the influence of the State governments, was groundless; and that, on the contrary, the weak point in the system is now fully shown to consist in the concentration of power and influence in the federal government, tending rapidly to absorb the entire sovereignty of the States.

I concede to the fullest extent, that high respect and deference for the decisions of the Supreme Court of the United States *justly* and *properly* due, from a consideration, not only of the position of that tribunal, but also of the eminent intellectual and moral qualities which have distinguished its incumbents. But timid submission to the exercise of extraordinary civil power, without even an inquiry into the reason or authority for its assumption, is not required by the high consideration due that court, nor is it a peculiarity of the age or country in which we live. It is not to be expected, in case of conflict between the authorities of the federal and the State governments, that the decision of the federal tribunal is to be above the reach of respectful examination, even by the authorities of the co-ordinate power. The sentiment which would exact such submission, may be becoming under the exercise of despotic power, where an inquiry into its reason or authority is not allowed, but it is not suited to the temper and characteristics of a free people.

It is said, that this appellate power of the Supreme Court of the United States has been exercised for many years, and sustained by repeated adjudications. If unauthorized, it is a sufficient answer to this, that the usurpation of civil power, in this country, never becomes constitutional or legal by prescription, or frequent repetition. And although the federal court has decided in favor of its own assumptions of power over the State courts, its decisions have not been universally acquiesced in; on the contrary, some of the States have not only absolutely refused submission, but successfully

resisted its power. In the case of *Hunter* against *Martin*, devisee of Fairfax, in which the validity of a treaty of the United States was drawn into question, the Supreme Court of Appeals of the State of Virginia unanimously refused obedience to a mandate from the Supreme Court of the United States, holding that the 25th section of the Judiciary Act was unconstitutional, that the appellate power of the Supreme Court of the United States could not be extended to the proceedings of the State courts, and that the proceedings of the federal court in that case, purporting to reverse the judgment of the State court, were *coram non judice*. It appears from the report of this case, in 4 Mumford's Rep., p. 1, that the subject was thoroughly investigated on the hearing, and an elaborate opinion from each member of the court is given, maintaining the position taken, by arguments remarkable for ability, and the dignified and dispassionate view taken of the whole subject.

The case of *Worcester* vs. *The State of Georgia*, 6 Peters, 515, was a writ of error from the Supreme Court of the United States to the Superior Court of Gwinnett county, to reverse the judgment of the State court, under which Worcester had been convicted and sentenced to the penitentiary for the violation of the criminal provisions of a statute of Georgia, in relation to white persons residing within the Cherokee nation of Indians, without permission and conformity to the laws of the State. The Supreme Court of the United States, in 1832, gave judgment reversing and annulling the judgment of the State court, and directing a special mandate to be sent to the State court, to carry the judgment of reversal into execution.

And in the case of *Butler* vs. *The State of Georgia*, which was a case of the same kind, the Supreme Court of the United States rendered the same kind of a judgment, and made the same kind of an order as that made in the case of *Worcester*, 6 Peters, 597.

It appears, however, that on the receipt of the mandate in each of these cases, the authorities of the State of Georgia treated them as matters of no validity, wholly disregarded them, and not only

kept Worcester and Butler in the penitentiary, in defiance of the orders of the Supreme Court of the United States, but also continued to execute the State law under which they were convicted.

Two other cases occurred in Georgia, of even a more serious character: one, the case of *Tassels*, in 1830, and the other, the case of *Graves*, in 1834. Each of these persons having been convicted under the criminal laws of the State, and sentenced to the punishment of death, the Supreme Court of the United States in each case, on the application of the defendant, had allowed a writ of error to the State court; but the State authorities, in each case, treated the proceedings in the federal court with contempt, and executed the sentence of the State court by hanging the defendants. But the matter was not allowed to stop here. In reference to the case of *Tassels*, the legislature of the State of Georgia, in 1830, adopted, among others, the following Resolutions:

"*Resolved*, That the State of Georgia will never so far compromit her sovereignty as an independent State, as to become a party to the case sought to be made before the Supreme Court of the United States, by the writ in question.

"*Resolved*, That his excellency, the governor, be, and he and every other officer of this State, is hereby requested and enjoined to disregard any and every mandate and process that has been, or shall be served on him or them, purporting to proceed from the chief justice, or any associate justice of the Supreme Court of the United States, for the purpose of arresting the execution of any of the criminal laws of this State."

Resolutions were also passed by the Legislature of that State, to the same effect, in reference to the case of *Graves*, in 1834.

It is understood that the States of Virginia and Georgia have ever refused to recognize, or acquiesce in, the exercise of this power by the Supreme Court of the United States. And in the recent case of *Padelford, Fay & Co.* vs. *The City of Savannah*, decided in the Supreme Court of Georgia, 14 Georgia, 440, an elaborate opinion is given, exposing and condemning in strong and severe terms, this unwarranted exercise of power by the Supreme Court of the United States.

In the case of the *Commonwealth* vs. *Cobbet*, 3 Dallas' Rep., 467, the Supreme Court of the State of Pennsylvania, by a solemn adjudication, unanimously refused to submit to the control of the federal judiciary over the State courts, provided for in the judiciary act of 1789, on the ground of its unconstitutionality. And in this case, Chief Justice M'Kean, very fully expressed the opinion of the court against the interpretation of the constitution by which this appellate power is claimed.

I am not informed of a single instance, in which the question has been fairly made in the Supreme Court of a State, where this power claimed for the Supreme Court of the United States has been approved, although it has been reluctantly submitted to, in a number of instances.

It may well be claimed, therefore, that this doctrine of the Supreme Court of the United States is not of *unquestionable*, nor of *unquestioned* authority. On the contrary, it appears, that since its first assumption, although it may have been submitted to, in a number of instances, without the question being made, yet it has been always questioned in some of the States, and not only denied in their courts, but in some cases successfully resisted.

The decisions of the Supreme Court of the United States, in favor of its own assumptions of power, and the enlargement of the powers of the general government, have not been satisfactory, and have greatly detracted from the weight, which would have been otherwise conceded to the opinions of that tribunal. The federal courts, at first, even assumed jurisdiction of crimes at common law. 2 Dallas's Rep. 297, 384. This jurisdiction, was afterwards abandoned, and is now conceded to have been an unauthorized exercise of power. And it is a remarkable fact, that almost every unwarranted stretch of power by Congress, has been sustained by the Supreme Court of the United States. This is a matter of public history. The alien and sedition laws; the vexatious regulations of the embargo and non-intercourse acts; the act to incorporate a bank of the United States, (passed in the exercise of a power, not only not found in the constitution, but which the convention

which framed the Constitution of the United States, by a distinct vote, positively refused to delegate); the recent bankrupt law, (which, by its retro-active operation, invaded the rights of private property, and to an alarming extent, impaired the obligations of *actual contracts*, made on the faith reposed in the integrity of the government, and on the terms of existing laws;) these, and numerous other acts, which might be mentioned, now repealed, and wholly repudiated by the force of public sentiment, as unwarranted by the constitution, received a ready sanction in the Supreme Court of the United States. In view of the unmistakable disposition manifested by that tribunal, to enlarge the powers of the general government by construction; in view of the fact, that it has taken under its protection almost every species of corporations, political, pecuniary, and eleemosynary; in view of its repeated encroahments on the sovereignty of the States, by annulling laws which, in no way whatever, concerned the affairs of the federal government, or interfered with the progress of its legitimate administration, it must be admitted, although much to be lamented, that the decisions of that tribunal have not only lost much of their moral influence, but much weight as judicial authority in the Courts of the States.

In asserting this appellate power over the State courts, the Supreme Court of the United States has not deduced it from the constitution by any clear and satisfactory interpretation. The cases in which the Court has attempted to defend this power by argument, are *Martin* vs. *Hunter*, 1 Wheat. 304, and *Cohens* vs. *Virginia*, 6 Wheat. 413. In the first, the opinion of the Court is by Mr. Justice Story, in the latter, by Chief Justice Marshall. In both these opinions, the second clause of the second section of the third article of the constitution, which contains the clause providing for the appellate power of the Supreme Court, is separated from its connection with the other parts of its subject matter, and taken abstractly, is declared to give appellate power in general terms, without any reference whatever to the inferior courts over which it shall be exercised. This, as I have already shown, is an unfair and unwarrantable mode of construing the constitution. Taken in its

proper connection, the appellate power here given has a clear and undoubted reference and application to the inferior federal courts mentioned and authorized as a part of the same judicial system.

Again, remarkable as it may seem in both these opinions, the first clause of this second section, which provides that "the judicial power of the United States shall *extend* to all cases in law and equity arising under this constitution, the laws of the United States, and treaties," &c., is relied on to sustain this appellate power. I have already shown that this provision clearly confers neither appellate nor exclusive jurisdiction.

In the case of *Martin* vs. *Hunter*, 1 Wheat. 340, the Supreme Court of the United States concedes the fact, that the language of constitution *extending* the judicial power to "all cases" arising out of the enumerated subjects, does not confer *exclusive* jurisdiction touching these matters. But Mr. Justice Story says, that, as the State courts will exercise concurrent jurisdiction over many of these enumerated subjects, if no appeal can be taken from the State courts to the federal courts, the judicial power of the United States will *extend* only to *some*, and not *all such cases!* This is certainly an unsatisfactory mode of reasoning. If even the right of appeal from the State courts to the federal courts existed, it would frequently happen that an appeal would not be taken from the adjudication in the State court. In such case, could it be pretended that the constitutional exercise of the judicial power of the United States was defeated? Certainly not. It may be said, however, that the failing party had the *option* to appeal, and bring his case within the judicial power of the United States. But if this extension of the judicial power of the United States to *all cases*, &c., is answered by leaving it to the *option* of one of the parties to bring the case within the exercise of it, the *option* of the party instituting the suit to bring it in the federal courts, is all sufficient. This would be extending the judicial power of the United States to all the enumerated cases in accordance with the constitution, which can mean nothing more than authority to exercise jurisdiction over any of the specified cases, whenever a party shall elect to institute a suit in the federal courts touching the same.

In both these opinions, the federal court has manifested great sensitiveness and jealousy in regard to the concurrent jurisdiction of the State courts. The leading consideration in the strained construction given to the constitution by the federal court, appears to be founded on the supposed abuse of power by the State courts. It seems to be taken for granted that the State courts are not to be trusted, and will be unfaithful to the Constitution of the United States, notwithstanding the judges are sworn to support it. And Judge Story, in *Martin* vs. *Hunter*, 1 Wheat. 348, said that "mischiefs truly deplorable" would exist, if the federal court did not exercise a supervisory control over the State tribunals. And in the case of *Cohens* vs. *Virginia*, 6 Wheat. 264, Chief Justice Marshall said, "*it would be hazarding too much to assert that the judicatures of the States will be exempt from the prejudices by which the Legislatures and people are influenced, and will constitute perfectly impartial tribunals.*"

The anticipated abuse of power by the States, and the supposed disregard of the constitution and laws of the United States, by the State courts, is made the *pretext* for the assumption of this appellate power over the State courts. In both the opinions of the Supreme Court of the United States mentioned, the burden of the argument is, that this supervisory power is *reasonable*, *proper*, and highly *necessary*. The *necessity* and *utility* of the power has ever been the tyrant's plea for the usurpation of power. This argument founded on the utility and necessity of the power, would have been legitimate in the convention which formed the constitution, or on a proposition to amend the constitution, but in giving a construction to the constitution, it is entitled to no consideration whatever, if the power be not *fairly* and *clearly* deducible from the language of the instrument.

In both of these opinions of the Supreme Court of the United States, the "Federalist" is relied on as very high authority. And here the remark is not inappropriate, that one of the leading points decided in the case of *Cohens* vs. *Virginia*, was, that this appellate jurisdiction could be exercised against a State as a party defendant. On this point, however, the authority of the "Federalist" is in

direct conflict with the decision of the court, as appears by the following extract from the 81st article of that work.

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind, and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal." . . . . . "The contracts between a nation and individuals, are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be, to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident it could not be done, without waging war against the contracting State, and *to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and* UNWARRANTABLE."

Although the Federalist is cited as reliable authority to sustain the appellate power of the Supreme Court of the United States over the State courts, yet the opinion expressed in this work, that a State is not amenable to a suit brought against it in the federal courts, is wholly repudiated. And as early as the case of *Chisholm* vs. *Georgia*, 2 Dallas, 474, the Supreme Court of the United States, held, that the judicial power of the United States extended to a suit against a State, since which it has been no rare occurence for a State to be arraigned before the bar of the Supreme Court of the United States. And inasmuch as Judge Story, in a note in his Commentaries on the Constitution, vol. 3, p. 548, not only repudiates the doctrine of Mr. Hamilton above recited in the 81st article of the Federalist, as irreconcilable with the reasoning of the next preceding article of the same work; but also, on page 546, of his Commentaries, copies extensively from this preceding article in the Federalist, to sustain the opposite opinion, I will take the liberty of sustaining the doctrine of the Federalist in article 81, above recited, by an authority entitled to very great respect. In the convention of Virginia, on the occasion of the ratification of the Constitution of the United States, John Marshall, (afterwards Chief Justice) in a speech in the convention, said:

"I hope no gentleman will think that a State will be called at the bar of the federal court. Is there no such case at present? Are there not many cases, in which

the legislature of Virginia is a party, and yet the State is not sued? It is not rational to suppose, that the sovereign power shall be dragged before a Court. The intent is, to enable States to recover claims of individuals residing in other States. I contend this construction is warranted by the words. But, say they, there will be partiality in it, if a State cannot be defendant, if an individual cannot proceed to obtain judgment against a State, though he may be sued by a State. It is necessary to be so, and cannot be avoided." Elliott's Debates, vol. 2, page 405.

It would appear, therefore, that the "Federalist" is not only not always consistent with itself, but not always consistent with the doctrine of the Supreme Court of the Uuited States; that Chief Justice Marshall announced a doctrine from the bench, the very opposite of that which he had previously declared in the convention of Virginia, when urging the adoption of the Constitution; and that Mr. Justice Story, while he adopted the doctrine of one article in the "Federalist" as *high authority*, repudiated that of the next succeeding article, as irreconcilable with the part of the work which he had adopted! The opinions of these great, and no doubt, good men, entangled with plain inconsistencies and confounded by conflict, constitute the chief weight of authority to sustain the supervisory power of the Supreme Court of the United States over the State courts. It is true, that the Commentaries of Chancellor Kent, and also the works of some other highly respectable elementary writers, are sometimes referred to as sustaining this appellate power. But it is to be remarked, that none of these writers have entered into any investigation of the subject themselves. They simply give the opinions declared by the Supreme Court of the United States, and that found in the "Federalist," on which the whole doctrine appears to rest.

The admitted fact that the Supreme Court of the United States cannot control the action of the State courts by *supercedeas*, *procedendo*, or *mandamus*, furnishes a most conclusive argument against the right to the appellate jurisdiction in question. Such power of control over subordinate courts is essential to the complete and proper exercise of the appellate power.

The twenty-fifth section of the judiciary act of 1789 provides only for its exercise in cases where the record of the State court discloses the fact that questions arose connected with some of the

enumerated subjects of the federal jurisdiction. And the Supreme Court of the United States have, in numerous cases, adjudged that it was essential to the exercise of this appellate power over the State courts, that the record of the State court should explicitly show the following indispensable requisites, to wit: First, that a question arose in the State court involving some one of the specified subjects of the judicial power of the United States. Second, that a decision was actually made on the question in the State court, in the way pointed out in Act of Congress. Third, that the decision became necessary in the determination of the case. And if each one of these requisites do not appear by the record, it is held, that the jurisdiction fails. *Crowell* vs. *Randall*, 10 Pet. 368; *Commercial Bank of Cincinnati* vs. *Buckingham's Ex'rs*, 5 Howard, 341.

Now, it is unquestionable that the State courts have ample and complete control over the records of their own proceedings; and may, in most cases, successfully defeat this appellate power, by causing their records to be so made up as not to show that any such questions arose, or were decided. And it is undeniable that each State has the power even to prohibit the allowance of a copy of the record of any of its judicial proceedings, for the exercise of this appellate jurisdiction by the federal courts. And the Supreme Court of the United States being clothed with no power by mandamus or otherwise, either to control the form of the record in the State court, or to compel the furnishing of an exemplification, this appellate power must be wholly dependent on the discretion of the State, and the action of the State court. The exercise of such appellate power, dependent in a great measure on the option of the subordinate court and wholly on the acquiescence of the State government, and to which, although some of the States will submit, yet, to which other States will absolutely refuse submission, will lead to more conflict, difficulty, uncertainty and disturbance of harmony in the administration of justice, than can be countervailed by any supposed benefit which can ever arise from it.

To sustain the supervising control of the federal courts over the State courts it is asserted that the government of the United States

is a *national* instead of a *federal* government; and that the judicial powers of the general and the State governments are blended together as parts of the same judicial system. Mr. Hamilton in the 82d article of the Federalist, said, "*Agreeably to the remark already made, the national and the State systems are to be regarded as* ONE WHOLE. The courts of the latter will of course be natural *auxiliaries* to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of natural justice and the rules of national decision!" The ground of the appeal insisted upon here is not any express provision in the constitution, but that the government of the United States is *national* in its character, the State courts mere auxiliaries of the courts of the United States, and the *national* and the State judicial systems to be regarded as parts of one and the same system, or in the language of Mr. Hamilton, "*as one whole.*" This doctrine is not merely quoted by Chief Justice Marshall, in the case of *Cohens* vs. *Virginia*, with marked approbation, but adopted as the true exposition of the theory and basis of our government. And in the case of *Martin* vs. *Hunter's Lessee*, 1 Wheat. 323, Mr. Justice Story not only adopted the same doctrine, but enlarging and amplifying on it, said, "The Constitution of the United States was ordained and established, not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by '*the people of the United States.*' There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary, to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority."

This is the only ground which gives plausibility even to the claim of a supervising power in the Supreme Court of the United States over the State courts. If the government of the United States be a *national* government, and the States subordinate departments, if the judiciary of the United States and that of the several States are blended, belong to one and the same system, are but parts of "*one whole,*" deriving their powers from the same source, and

responsible to the same authority, then it may be admitted that there is force in the argument in favor of this appellate power. But if on the other hand the government of the United States be a *federal* government of limited and defined powers, and the States distinct, independent sovereignties within the appropriate sphere of their powers; if the judiciary of the United States and that of the several States are separate and distinct from each other, belonging to independent and distinct judicial systems, each distinct and different in its organization from the other, deriving its power from a different source, and responsible to a different authority, then this appellate power claimed for the Supreme Court of the United States is wholly inconsistent with the theory and structure of our government.

This distinction is a most important one in the determination of the question under consideration. As has already been remarked, appellate jurisdiction comprehends the relation of superior and subordinate tribunals. And if this appellate power over the State courts be delegated by the Constitution, Congress has the authority to provide all the *necessary* and *proper* remedies to carry it into full and complete execution. For the full exercise of the powers of an appellate court, there must be not only the power of reversing the judgment of the subordinate court, but the necessary control over its action. The appellate court must have the power by *supercedeas* to suspend the action of the subordinate tribunal, pending an appeal or writ of error; the power by *mandate* to require its judgments of reversal to be entered in the subordinate court, and the power by *procedendo* to compel the subordinate court to proceed in the exercise of its authority under the direction of the revising power. And the very fact of the relation of superior and subordinate tribunals in the exercise of the same judicial power, furnishes just foundation for giving the superior court the further controlling power of the writ of mandamus and also the writ of prohibition. And if Congress can give the Supreme Court of the United States supervising power over the State courts, it can confer the same power on the Circuit, the District, and other inferior federal courts. The one is derived from a construction which most indubitably

sustains the other. The Constitution, although it prescribes the line of distinction between the original and appellate jurisdiction of the Supreme Court, leaves the distribution of the jurisdiction of the inferior federal courts to the *discretion* of Congress. And if the relations of the general and the State governments be such that a supervising power can be given by Congress over the courts of the latter to the Supreme Court of the United States, it follows that by the exercise of the same power it can be given to the inferior federal tribunals in regulating their appellate jurisdiction. So that, if Mr. Hamilton's proposition in relation to the appellate power of the Supreme Court be correct, his opinion above referred to in the Federalist, in relation to the appellate power which might be given to the inferior federal courts over the State courts follows as a legitimate deduction. And in the case of *Martin* vs. *Hunter*, above cited, in 1 Wheat., on page 349, Mr. Justice Story, in defending the provision of the 12th section of the United States Judiciary Act of 1789, for the removal of a suit before trial from the State courts to the Circuit Court of the United States, distinctly said, that this is the exercise of *appellate* and not of *original* jurisdiction. And on page 350, he adds, "*And if the appellate power by the Constitution does not include cases pending in the State courts, the right of removal, which is but a mode of exercising that power, cannot be applied to them.*" The same doctrine is adopted and repeated by the learned jurist, in the 3d Vol. of his Commentaries on the Constitution, pages 609 and 610. This proceeding of the federal judiciary gives a new feature to appellate jurisdiction, heretofore understood as importing the power of *retrying* or *revising* the proceedings or decisions of a subordinate court in which *judicial action had actually taken place.* Under this provision of the judiciary act, the cause is required to be transferred to the federal court before there has been any decision or any action whatever taken by the State court. And *this*, Mr. Justice Story called *appellate jurisdiction*, and said that the right of removal cannot be exercised unless it be by *appellate jurisdiction.* Yet the learned commentator, in the 3d Vol. of his Commentaries on the Constitution on page 627, said:

"In reference to judicial tribunals, an appellate jurisdiction, therefore, necesarily implies, that the subject matter has been already instituted in, *and acted upon by*

some other court, whose judgment or proceedings are to be revised. This appellate jurisdiction may be exercised in a variety of forms, and indeed in any form which the legislature may choose to prescribe; but still, the substance must exist, before the form can be applied to it. To operate at all, then, under the constitution of the United States, it is not sufficient that there has been *a decision* by some officer, or department of the United States; it must be by one clothed with judicial authority, and acting in a judicial capacity."

This doctrine in relation to the foundation for the exercise of appellate jurisdiction will be universally recognized as correct, and how it is to be reconciled with the proceeding under the 12th section of the judiciary act, for the removal of a cause from a State court after its jurisdiction has legally and constitutionally attached, but before any judicial action has been taken in the case, is left for others to say, presuming it to be one of the instances in which extraordinary power requires extraordinary reasons to sustain it.

It appears, therefore, according to the doctrine of Mr. Justice Story, that the appellate jurisdiction of the subordinate federal courts over the State courts, has been already, in one form, actually provided for. If the federal courts can exercise a revising power over the State courts, in cases where the jurisdiction of the State tribunals is fully admitted, it must result from the subordination of the State courts to the federal tribunals, and because the government of the United States, and that of the several States, are not equal and co-ordinate governments, but because the government of the United States is *national* in its form, and the States but subordinate parts of one consolidated system.

Appellate jurisdiction is not only a continuation of the exercise of the same judicial power which has been executed in the court of original jurisdiction, but it necessarily implies that the original and appellate courts are capable of participating in the exercise of the same judicial power. After the exercise of the appellate power in the adjudication of a cause, important judicial acts often remain to be done in the court of original jurisdiction. The entry of the judgment in the subordinate court, is essential; otherwise the judgment on the records of that court appearing in full force, would entitle the party to the process of the court to enforce it; and in such case, if process be issued on the judgment in the appellate court, a con-

flict would arise between the ministerial officers of the two courts, each protected by judicial process. But further, the subordinate court has more to do than simply enter the judgment of the appellate court; it must conform its action to it, and carry it into full effect. It is frequently necessary in the proper exercise of the revising power, that the appellate court simply settle some general principles or preliminary questions which govern a case, and remand it to the subordinate court with a procedendo, thus directing and controlling the action of the court of original jurisdiction, in the further investigation and adjudication of the case. In the case before us, suppose we should allow this motion and the Supreme Court of the United States should reverse our judgment, the mandate of that court to us would require us to enter upon our records, a judgment not our own, but a judgment pronounced by that court, contrary to our own judgment in the case, and which we would be commanded to carry into effect. If we should comply with the mandate by entering the judgment of reversal, and conforming our action to it, and carry it into full effect, we would perform either a *ministerial* or a *judicial* act. It would scarcely be pretended by any to be the former. There is certainly no authority for the federal court to require the performance of ministerial or executive duties by this court. Ministerial or executive duties under a department of the general government, are performed by ministerial or executive officers appointed and acting under the authority of the constitution and laws of the United States. As it could not be a *ministerial*, it must be a *judicial* act, which we would be directed to perform. Every *judicial act* necessarily requires the exercise of *judicial power*. In the performance of this act, would we exercise the judicial power of the United States or the judicial power of the State of Ohio? It could not be the judicial power of the State. That has been fully and finally exercised in the case, by the judgment which we have already rendered. A final judgment in this court expends or exhausts its judicial power as to that case; and unless brought up again upon some motion or proceeding known to the laws of the State or some action by the Supreme Court of Ohio, the judicial power of the State must there finally terminate.

And it will not be pretended that there is anything in the constitution or laws of Ohio requiring of us, either the performance of any such act, or even the one now asked by the motion before us. If either could be legally done at all, it would have to be done in the exercise of the judicial power of the United States. But how are we to be enabled to exercise the judicial power of the United States, when by the express provision of the constitution, all the judicial power of the United States is vested in one Supreme Court, and such inferior courts as Congress shall ordain and establish, the judges of which, shall hold their offices during good behavior, and receive a fixed compensation from the general government.

It is claimed, however, that the government of the United States is a *national* government, of which the States are mere subordinate departments, so that the judicial power of the several States, and that of the United States, are blended, and must be regarded as *one and the same*, and consequently that the courts of each may be enabled to exercise authority by virtue of the judicial power of the other. This involves an inquiry into the true theory and nature of our system of government in regard to a matter not depending on mere speculation, but a true exposition of which is to be found by reference to the constitution itself, and the public records and history of its formation.

A *national* government is the government of the people of a single State or nation united as a community by what is termed the social compact, and possessing complete and perfect supremacy over persons and things, so far as they can be made the lawful objects of civil government. A *federal* government is distinguished from a *national* government, by its being the government of a community of independent and sovereign States, united by compact. The thirty-ninth number of the "Federalist," furnishes the followin distinction between a *national* and *federal* government:

"The idea of a national government involves in it not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general, and

partly in the municipal legislatures. In the former case, all local authorities are subordinate to the Supreme; and may be controlled, directed or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, *no more subject within their respective spheres to the general authority, than the general authority is subject to them within its own sphere.* In this relation, then, the proposed government cannot be deemed a *national* one, since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects."

Originally each State of the American Union was, in the language of the Declaration of Independence, "free and independent," possessing all the powers and supremacy of a separate and distinct nation of people. The Constitution of the United States originated from the confederation of the states under the Articles of Confederation of 1778, the first and second articles of which were as follows:

ARTICLE 1. The style of this confederacy shall be "*The United States of America.*"

ARTICLE 2. Each State retains its *sovereignty, freedom* and *independence*, and every power, jurisdiction and right which is not by this confederation expressly delegated to the United States in Congress assembled."

It is not pretended by any, that this confederacy possessed the elements of a national government, but it is admitted to have been a simple compact between independent states for mutual defence, and some other general purposes. It is claimed by some, however, that by the Constitution of the United States, the sovereignty of the people of each State was surrendered and transferred to the people of all the States in the aggregate, and that thus, the people of all the States of the Union, became consolidated into one single community or nation. The history of the formation of the Constitution exposes the utter fallacy of such an idea. The convention which framed the Constitution, was called not by the *act* or *authority* of the people of the several States in mass, but by a resolution of the Congress, the organ of the several States under the confederacy. And it was called not for the purpose of establishing a national government, but on the contrary, in the language of the resolution of the Congress of the confederacy calling the convention, "for the *sole* and *express* purpose of *revising* the Articles of Confederation, and reporting to Congress and the several State legislatures, such *alterations* and *provisions therein*, as shall render the *federal*

constitution adequate to the exigencies of the government, and the preservation of THE UNION."

The object of the convention is here most explicitly defined. It was, not to establish a *national* government for the people of all the States, and thereby abolish the State sovereignties; but *solely and expressly to revise the articles of confederation between the several States, &c.* With this distinctly defined object in view, the delegates to that convention were appointed, not by the authority of the people of the States in the aggregate, but by the legislatures of the several States. And the commissions from the several States to their delegatees in this convention expressly limited their authority to this definite object, for which the convention was convened. In the convention which framed the Constitution the delegates voted by States, and after its formation, it was submitted to the several States and ratified, not by the whole people of the United States, but by each State acting separately and for itself as an independent sovereignty.

The formation and ratification of the Constitution, therefore, was *not* the act of the people of the States *collectively*, but the act of the people of *each* state acting *separately and independently* for themselves. And the distinctly defined *object* with which it was done, was, not the establishment of a consolidated national government for the people of the whole United States, as one community or nation, but the simple revision of the Articles of Confederation and the establishment of a government based on the federal compact. This is fully sustained by the views of Mr. Madison, expressed in the number of the Federalist last above quoted, in which he said:

"This assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State, the authority of the people themselves. The act, therefore, establishing the Constitution, will not be a *national* but a *federal* act."

And the author continues:

"That it will be a *federal*, and not a *national* act, as these terms are understood by the objectors, the act of the people as forming so many independent States, not

as forming one aggregate nation, is obvious from this single consideration, that it is to result neither from the decision of a *majority* of the people of the Union, nor that of a *majority* of the States. It must result from the *unanimous* assent of the several States that are parties to it, differing no otherwise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the people themselves. Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority in the same manner as the majority in each State must bind the minority, and the will of the majority must be determined either by a comparison of the individual votes, or by considering the will of the majority of the States, as evidence of the will of the majority of the people of the United States. Neither of these rules has been adopted. Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new constitution will, if established, be a *federal* and not a *national* constitution."

Those who insist on the appellate power of the Supreme Court of the United States in question, cannot consistently repudiate the authority of the "Federalist."

The preamble to the constitution has been appealed to, in support of the doctrine, that the Constitution of the United States was ordained and established by, and for, the people of the States collectively, as a distinct community or nation. This argument is founded upon a mere *literal* interpretation of the preamble, wholly disregarding the *true authority* by which the constitution was established, the *source* from which its powers were derived, and the *true nature* and *objects* of the powers delegated. The preamble reads, "*We, the people of the United States, in order to form a more perfect union*, &c., *do ordain and establish this constitution of the United States of America.*" What is here meant by the expression, "*We, the people of the United States?*" It expresses the *authority* by which the thing was done. It means the *people* by whose authority the constitution was formed and ratified. It was the *act* of forming and ratifying the constitution which *ordained and established* it. It was formed by delegates appointed by the representatives of the people of the several States in their respective State legislatures; and it was *ratified* by the several States, through a convention of delegates in each State, elected by the people of the State, each State, in doing the same, acting for itself and by the authority of its

people, as a separate and independent nation. The constitution, therefore, was *ordained and established, not by the whole people of the United States collectively*, or *in mass*, as a distinct community, but by the several States, the people of each acting in the name and by the authority of their State, as a distinct, independent, sovereign people. It is, therefore, incontestible, that the words of the preamble, "We, the people of the United States," mean the people of the *several* States of the Union, *not collectively and in mass*, but as the people of distinct independent States, acting by their respective *separate State authorities*, in forming a compact with each other, and establishing a federal government, or government, the parties to which were *distinct communities, or independent States*, as contradistinguished from the people of all the States taken collectively or in mass. At the time of the formation of the constitution, the States were members of the confederacy united under the style of "The United States of America," and upon the express condition that "each State retains its *sovereignty, freedom* and *independence.*" And the consideration that, under the confederation, "We, the people of the United States of America," indubitably signified the people of the several States of the Union, as free, independent and sovereign States," coupled with the fact that the constitution was a *continuation* of the *same Union*, and a mere *revision* or *remodelling* of the confederation, is absolutely conclusive that, by the term, "The United States," is meant the *several States* united as independent and *sovereign communities;* and by the words, "We, the people of the United States," is meant the people of the *several States* as *distinct and sovereign communties*, and not the people of the whole United States collectively as a nation.

The preamble declares that the constitution was ordained and established "*for the United States of America.*" And as "The United States" means the *several States* united by compact under a federal government of limited and expressly defined powers, it follows, that the constitution was ordained and established *for* the people of the several States as distinct communities, by whom it was ordained and established. The omission to enumerate the States by name, *by which* and *for which* the constitution was

ordained and established, makes nothing against this interpretation. It appears from the proceedings in the convention which formed the constitution, that the first draft of the constitution contained an enumeration of the States by name, after the word "PEOPLE;" but after the adoption of the seventh and last article, providing that "the ratification of the conventions of nine States should be sufficient for the establishment of this constitution between the *States so ratifying the same*," it became necessary to strike out the enumeration of the States by name, which was accordingly done. See Madison's Debates, vol. 1, p. 1539.

The *objects* for which the constitution was ordained and established are explicitly defined in the preamble. Had the object been to abolish the States as independent and sovereign communities, and establish a national government for the American people collectively, as constituting one consolidated distinct community, it would have effected a change far greater than that which was effected by the American Revolution; and that purpose would have been manifested by provisions leaving no ground for cavil or doubt. But the *objects* of the constitution declared in the preamble, differ very little from the purposes of the confederation as declared in the third number of the Articles of Confederation. The objects announced in the constitution are, *to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.*" These purposes are very far from indicating an intention to establish a consolidated national government. The first purpose named, is that of forming a more perfect union, thus *recognizing* the *existing union* between the several States, under the confederation, and simply proposing to render *it more perfect.* What union is here contemplated? The question admits of but one answer. The union between the independent and sovereign States already existing. The federal character of the government is here explicitly declared as distinguished from a consolidated national government of the American people. And when we consider the constitution as ordained and established by the people of the several States, *for themselves*, as *distinct and*

sovereign communities, the *objects* announced in the preamble are plain and easy of comprehension. They were to *perfect their union* as distinct and sovereign communities; to establish justice among *them;* to insure *their* domestic tranquillity; to provide for *their* common defence and general welfare; and to secure the blessings of liberty to *them* and *their* posterity, as the people of several distinct communities. And the provisions in the body of the constitution, in every article, when correctly construed, fully confirm the views here expressed. Calhoun's Works, vol. 1, 130 and 137.

According to the doctrine of the "Federalist," however, in one part of the work, the government of the United States is partly *federal* and partly *national* in its *operation*, and in the *source* from which its powers are derived. This position, however, will not bear the test of examination. The Constitution is admitted to be *federal, and not national* by the same work, as has been already shown. And inasmuch as the government derives all its powers from the Constitution, and is organized on the basis of it, and indeed constituted by it, how the government can be *national* in any part, or in any sense, is not easy of comprehension. According to the theory of our institutions, sovereignty vests in the people, and government is constituted by a delegation of civil power in trust for the purposes prescribed. If the general government is to any extent, or in any sense, a *national* government, it must be to that extent, or in that sense, the government of the whole people of the several States collectively, or as one consolidated community; and this could not have been brought about, without the people of the several States surrendering their sovereignty, and transferring it, not to the government, but to the whole people of the States collectively. It has been said that sovereignty is a thing, which from its nature is not susceptible of division—that the sovereign power may delegate *authority* and prescribe limits for its exercise; but cannot surrender a portion of its sovereignty, without ceasing to be the repository of the sovereignty of a State or nation. Without stopping to inquire into the correctness of this position, it is sufficient to say, that there is no provision in the Constitution of the United States, or act in its formation and adoption, which amounts to any-

thing like a surrender of sovereignty by the people of the several States, and a transfer of it to the whole people of the States collectively, as a distinct community, or consolidated nation of people.

The particulars in which the Federalist claims the government to be partly *national* and partly *federal*, are the following: First, in regard to the House of Representatives in Congress; second, in regard to the Executive Department; and lastly, in regard to the power of Amendment. As to the first, it is said, in number thirty-nine of the work, that "the House of Representatives will derive its powers from the people of America, and the people will be represented in the same proportion, and on the same principle, as they are in a legislature of a particular State;" and that so far the government is *national*, and not *federal*, &c. The fallacy of this doctrine is most glaring. All the powers of the government, including those of the House of Representatives, are derived from the Constitution; and the powers of the Constitution are delegated, not by the American people in the aggregate, as a distinct community or nation, but by the people of the several States, as separate, independent and sovereign States. And consistently with the Constitution, it is not competent to elect the members of the House of Representatives by the American people collectively, as a distinct community; on the contrary, by the express provisions of the Constitution, they are required to be elected by the people of the several States, not as composing mere districts of one great community, but as distinct and independent States. The first bill which passed Congress, apportioning the members of the House of Representatives among the several States, was vetoed by President Washington, expressly on the ground that it assumed as its basis that the people of the several States composed mere election districts of one great community, instead of being, as in truth they are under the Constitution, distinct and independent parties to the compact upon which the government is founded. By the terms of the Constitution, the representatives are apportioned among the several States, in a mode expressly prescribed, and they are required to be elected by the people of the several States, as independent communities. They may be elected by the people of any State, either by general

ticket or by districts; so that the members of the House of Representatives, be the mode of election what it may, are elected as the delegates of the several States in their distinct, independent and sovereign character as members of the Union. Neither is it true, that the people of each State are represented in the House of Representatives on the same principle, and in the same proportion as they are in the legislature of each State. On the contrary, it is an incontestible fact that they are represented in their respective State legislatures as mere individuals, and by election districts entirely under the control of each State, and by a ratio or proportion fixed by each State for itself, and different in different States.

As to the executive department, the argument is equally groundless. The President of the United States is elected not by the whole people of the United States in the aggregate as a distinct community or people, but by electors appointed by each State separately and for itself, "*in such manner as the legislature thereof may direct;*" and the electors are expressly required to meet and vote in their respective States. And in case of a failure of an election by the electoral college, when the election devolves on the House of Representatives, the votes are required to be taken by States, the representation from each State having one vote, &c.

And as to the mode prescribed for the exercise of the amending power, it is plainly and expressly derived from, and exercised under the authority of the people of the several States, acting in their original, distinct, and sovereign character, and *not* under the authority of the whole people of the States regarded in the aggregate, as a distinct nation. And the modification of the original creating power requiring the consent of each State to make it a party to the constitution, which provides for the amendment of the constitution by three-fourths of the States, voting as States, without regard to population, certainly gives no *national* character to the government, neither is it inconsistent with the federal character of the Union, inasmuch as it is provided for by express agreement in the compact.

On the whole, it may be said, without the slightest ground for contradiction, that in the formation of the government of the

United States, the whole people of the States collectively as a distinct community or nation, were wholly unknown, and in no respect whatever the source of power; and also, that in no operation whatever of the general government, is the action of the people of the States in the aggregate *as a nation*, known or recognized in any manner or form whatever. Indeed, the people of the several States of the American union never have, at any stage of their existence, been consolidated into a single community, so as to constitute one distinct people or nation; and *as such* of course never could have exercised any agency or participation, either in the formation or in the administration of this system of government.

From what has been said, it must be apparent, that the government of the United States was ordained and established by the people of the *several States as distinct, independent, and sovereign communities;* and that while the governments of the several States derive their respective powers from the people as individuals united under the social compact in their respective States, the government of the United States derives its powers from the States as organized communities, united by federal compact. Each State government is a government of a community of people, while that of the United States, is a government of a community of States. A State government and the United States government are operative in each State; and each has its distinct, independent sphere of action. The main objects of the authority of the general government, are the relations of the States with each other, and with foreign nations, and the common defence and welfare of the federal union; leaving the internal affairs and domestic interests of the people of each State to the authority of the State government. The delegated powers appertaining to government are divided between these two governments, and each is divested of what the other possesses; each acting for itself, and by its own separate authority, the powers of each being entirely distinct and independent of the other, it follows of necessity, that the two governments are equal and coordinate governments in each State of the union; each paramount and supreme within the sphere of its powers. The confederation

which preceded the constitution of the United States, was subordinate to the State governments, upon which, to a great extent, it was dependent. To remedy the deficiencies of the confederation, the powers delegated by the constitution were made independent of the States. So that the government of the union and that of the several States, having each distinct and independent powers, and each distinct and independent spheres of action, *become equal* and *co-ordinate governments.* It follows as a necessary consequence, that each of the two governments being independent of the other, each must be *supreme* within the sphere of its operations, and neither can be *subordinate* to the other. So that, the judicial, as well as the legislative and executive powers of each, must of necessity be, not only entirely *distinct* and *separate*, but also *independent* of each other.

This view of the subject, so far as the separate, independent and co-ordinate judicial power of the two governments is involved, is fully sustained by judicial decisions in both the State and in the federal courts. In the case of *Martin* vs. *Hunter*, 1 Wheat. 304, the Supreme Court of the United States declare the doctrine, that Congress cannot vest any portion of the judicial power of the United States in any courts, except those which are ordained and established under the Constitution of the United States. It is universally admitted, that while Congress can impose no jurisdiction on the State courts, it is equally incompetent for a State legislature to impose jurisdiction on the federal courts.

It is contended further, that the Supreme Court of the United States is *the tribunal of last resort*, clothed with authority to decide all questions touching the extent of its own powers, and also, all controversies involving a conflict between the authorities of the federal and the several State governments, and that the appellate jurisdiction of the Supreme Court of the United States over the State courts, is necessarily incidental to, and results from this power. That the Supreme Court of the United States is the court of *last resort* to determine all cases which may be instituted under the jurisdiction of the federal courts, is not controverted; but that this

tribunal has not only absolute authority to determine the extent of its own powers, but also constituted an *umpire* to determine all questions of conflict arising between the several States and the federal government, is denied, and will be contested so long as the people of this country are capable of preserving their government in its original character. This arbitrary power once conceded, would enable the Supreme Court of the United States to nullify State laws, and even provisions in the State constitutions, whenever, in the opinion of that tribunal, there existed any inconsistency between them and any express or constructive authority, under the operation of the Constitution, laws, or treaties of the United States. It would annihilate the balance of power between equal and co-ordinate governments, and destroy that check upon the exercise of discretionary power, designed as the great safeguard against usurpation.

It is not claimed, I believe, that this high power is derived from any specific provision of the Constitution; but it is claimed to be a right incident to the supremacy of all government, to decide as to the extent of its own powers, and to use all the necessary means to enforce its own authority. However this may be applicable as an incident to a single government, vested with all the powers appertaining to government, it is clearly inapplicable to a system where the powers are divided between two distinct and co-ordinate governments, as is the case here. The very fact that these two distinct governments in one system, are *co-ordinate*, necessarily implies that they are equal, and excludes the idea of *superior* and *subordinate*. If either has the exclusive right to judge of the extent of its own powers, and also of that of its co-ordinate, and enforce its decision against the authority of the other by physical power, not only would equality between them be destroyed, but the one would be raised from an *equal* to a *superior*, and the other be reduced from an *equal* to a *subordinate*. And the subordinate, thus stripped of the incident appertaining to all government, to judge of the extent of its own powers with a view to their protection, would necessarily sink to the condition of a dependent. Where there is a *division* of power between co-ordinate departments of the same government,

each designed as a check upon the other, each must be allowed to judge of the extent of its powers, and to maintain its decision against the other. Without this, there can be no division of power. To vest power in two departments, and give one of them the exclusive right to judge of the extent not only of its own powers, and how much was allotted to the other, would be no division of power at all. The one would, in effect, hold under the other. But where two governments are distinct, independent and co-ordinate, each must possess all the necessary incidental powers appertaining to government, within the sphere of its powers, and consequently both must possess the right to judge of the extent of their respective powers, with reference to each other. And no reason can be assigned why one should be allowed the exclusive right to judge as to the extent of its own powers, and enforce its decision, more than the other. It is, therefore, one of the necessary incidents to the nature of distinct, independent and co-ordinate governments under the same system, that each operate as a mutual check upon the other. And in case of conflict of *authority*, resort is not to be had to *force;* for neither has the right to *force* its own decision upon the other. But the appeal is to the people, the sovereign and original source of power, which acts through the ballot-box upon the legislation of the country, both State and federal, and when found necessary, can alter the Constitution by amendment.

But it is insisted, that as the constitution, laws, and treaties of the United States are declared to be the supreme laws of the land, as the general government is supreme within its own sphere, this supremacy necessarily requires, all questions of conflict between its powers, and those of any of the States to be determined by the authority of the federal government. But as the constitution and laws of the several States are equally supreme to the extent of their operation, and each State government equal and co-ordinate with that of the United States, the inference mentioned is wholly unwarranted. That there is no repugnancy or incompatibility in the supremacy of each of these co-ordinate powers, and that the supremacy of the general government does not destroy the independence of the State sovereignties, was explained by Mr. Hamilton, in the convention of

New York, on the occasion of the ratification of the Constitution of the United States, in the following language, lucid, forcible, and conclusive:

"With regard to the jurisdiction of the government, so I shall certainly admit that the Constitution ought to be so formed, as not to prevent the States from providing for their own existence; and I maintain that it is so formed, and that their power of providing for themselves is sufficiently established. This is conceded by one gentleman, and in the next breath, the concession is retracted. He says, Congress have but one exclusive right in taxation, that of duties on imports; certainly, then, their other powers are concurrent. But to take off the force of this obvious conclusion, he immediately says that the laws of the United States are supreme, and that where there is one supreme, there cannot be concurrent authority; and further, that where the laws of the Union are supreme, those of the States must be subordinate, because there cannot be two supremes. This is curious sophistry. That two supreme powers cannot act together is false. They are inconsistent only when they are aimed at each other, or at one indivisible object. The laws of the United States are supreme, as to all their proper constitutional objects; the laws of the States are supreme in the same way. These supreme laws may act on different objects without clashing; or they may operate on different parts of the same common object with perfect harmony. Suppose both governments should lay a tax of a penny on a certain article, has not each an independent and uncontrollable power to collect its own tax? The meaning of the maxim, there cannot be two supremes, is simply this; two powers cannot be supreme over each other." See Elliott's Debates, vol. 1, p. 315.

Again, Mr. Hamilton on this subject, in the 33d number of the "Federalist," used the following language:

"But it is said, that the laws of the Union are to be the *supreme laws* of the land. What inference can be drawn from this, or what would they amount to if they were not supreme? It is evident they would amount to nothing. *A law* by the very meaning of the term includes supremacy. It is a rule, which those to whom it is prescribed, are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for political power and supremacy. But it will not follow from this doctrine, that acts of the larger society, which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be mere acts of usurpation, and will deserve to be treated as such. Hence we perceive, that the

clause which declares the supremacy of the laws of the Union, like the one we have just before considered, only declares a truth which flows immediately and necessarily from the institution of the federal government."

The doctrine that the Supreme Court of the United States is the tribunal constituted to determine all questions touching the extent of the powers of the State and the federal governments, and with authority to restrain the action of the sovereign power of the states by annulling State laws, and reversing the judgments of the State courts, imports an extraordinary exercise of power, for which *there should exist* a *clear* and *express warrant in the Constitution.* The question of the existence of this power has been very frequently brought before the Supreme Court of the United States, and instead of meeting the question and showing an unquestionable authority for it in the Constitution, that tribunal has attempted to maintain it upon various grounds, and among the rest, by a resort to an argument founded on the supposed danger of the abuse of power by the States, derogatory to the sovereign character of the States. Mr. Justice Story, in the case of *Martin* vs. *Hunter*, to maintain this alleged power, said, "*the constitution has presumed (whether rightly or wrongly, we do not inquire,) that State attachments, State prejudices, State jealousies and State interests, might sometimes obstruct or control, or be suppposed to obstruct or control, the regular administration of justice.*" Although our government was designed to be a government of checks and balances, to restrain the abuse of power in all its departments, this argument of the learned judge is not strictly in character with the subject of which he speaks. In the case of *Cohens* vs. *Virginia*, *McCulloch* vs. *Maryland*, and several other cases, language similar in effect has been used by the Supreme Court of the United States, imputing interested motives, prejudice, and passion to the State courts, as the reason for its own jurisdiction. And in the case of *Gordon* vs. *Longest*, 16 Peters, 98, that court adjudged that one great object of the establishment of the federal courts, and regulating their jurisdiction, was to have a tribunal in each State, *presumed* to be free from *local influence!* Now, it is at least novel, that a judicial tribunal should claim jurisdiction for itself, upon the ground

that other courts equally disinterested, would be subject to improper motives and influences. Where there has been judicial action by a court of competent jurisdiction, all presumptions are in favor of the correctness of the adjudication, while it remains in force, and the imputation of improper motives or influences are not to be allowed. It is essential to the supremacy of all civil government, that the passions and motives of men should not be imputed to the exercise of sovereignty. Although it is undoubtedly true that the feelings of men do enter more or less into most of the acts of sovereign power, yet it cannot be allowed for one set of men clothed with power, to allege the danger of the abuse of power by others in the exercise of authority, as a foundation upon which to build up power for themselves. In reference to the language of the Supreme Court of the United States, in the case of *McCulloch* vs. *Maryland*, the Court of Appeals of Kentucky placed this subject in a view so forcible and strong, that I deem it proper to make the following extract from the opinion, in the case of *The Commonwealth* vs. *Morrison et al.*, 2 Kentucky Rep. 537.

"The power to do good is, throughout all agency, except that of absolute perfection, the power to do evil. If the power of action were denied to all who could not pervert it, Deity alone could act. But the doctrine upon which the agency of the world hangs, is the very reverse: it is that power possessed may be used subject to the responsibility of the agent for its abuse. And it is upon this principle alone that we can have any just notions of morals, and of rewards and punishments. But sovereignty has a fictitious perfection and purity, which must be taken as real, and which cannot be controverted. Of course the abuse of power cannot be imputed to a sovereign, in restraint of its legitimate energies. The maxim that the King can do no wrong, is not an idle device of royalty formed to amuse or beguile the multitude: nor is the correspondent maxim, that the voice of the people is the voice of God, the offspring of the demagogue's brain. They are both just inferences drawn from the most profound views of civil policy, and illustrate the position advanced in relation to the purity and perfection of sovereignty. It is not that the king in a monarchy, or the people in a democracy, can do no wrong—for we know they are men, and of course partake of the frailties inseparable from human nature: as men they err frequently and egregiously. But it is the sovereignty with which they are invested, and in which they are merged, that is incapable of error. This incapacity in the sovereign to err, is matter of necessity. There is no tribunal before which the sovereign can be arraigned, his conduct examined, his errors and delinquencies detected, those errors corrected, and he punished. Sovereignty, therefore, whether displayed in the monarch or the multitude, possesses necessarily

this putative perfection; and is of course necessarily irresponsible. Upon this purity and unerring character of sovereignty, depends all the jurisdictions which are exercised in the governments throughout the world. Government could not exist upon any other hypothesis."

It seems to have been deemed necessary even to humble and degrade the sovereignty of the several states, in order to maintain the high assumptions of power claimed for the federal government.

Where is the provision of the constitution to be found, which ordains the Supreme Court of the United States as the only tribunal, or the tribunal of last resort, to determine all questions or controversies touching the boundary of the jurisdiction of the two governments, State and federal? The people were sparing and cautious in the powers they conferred on the general government, and particular to have them expressly and clearly defined. It is fair to presume that so important a matter as this would not have been left to mere implication or construction, had it been the intention to confer it. It is true, the "Federalist" comes in as authority to sustain this assumption. In the 39th number of this work, Mr. Madison used this language: "It is true, that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government." But if nothing else, the loose opinion here expressed, of itself, is most clearly sufficient to show that this work is not to be relied on in a legal investigation; because Mr. Madison, after ten years' observation of the practical o erations of the government, under the federal constitution, upon the most grave and deliberate consideration, expressed a directly opposite opinion, in his celebrated report and resolutions, adopted in the legislature of Virginia, in January, 1800, the following extract from which will be found conclusive and unanswerable on this subject:

"On this objection it might be observed, first, that there may be many instances of usurped power, which the forms of the constitution would never draw within the control of the judicial department; secondly, that if the decision of the judiciary be raised above the authority of the sovereign parties to the constitution, the decisions of the other departments, not carried by the forms of the constitution before the judiciary, must be equally authoritative and final with the decisions of that department; but the proper answer to the objection is, that the resolution of the General

Assembly relates to those great and extraordinary cases in which all the forms of the constitution may prove ineffectual against infractions dangerous to the essential rights of the parties to it. The resolution supposes that dangerous powers, not delegated, may not only be usurped and executed by the other departments, but that the judicial departments also may exercise or sanction dangerous powers beyond the grant of the constitution; and consequently, that the ultimate right of the parties to the constitution, to judge whether the compact has been dangerously violated, must extend to violations by one delegated authority as well as by another, by the judiciary as well as by the executive or legislative."

"However true, therefore, it may be, that the judicial department is, in all questions submitted to it by the forms of the constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the authorities of the other departments of the government; and not in relation to the rights of the parties to the constitutional compact, from which the judicial as well as the other departments hold their delegated trusts. On any other hypothesis, the delegation of judicial power would annul the authority delegating it; and the concurrence of this department with the others in usurped powers might subvert forever, and beyond the possible reach of any rightful remedy, the very constitution which all were instituted to preserve."

If the Supreme Court of the United States is constituted the tribunal of last resort, to determine all controversies touching the extent of the powers of the two governments, it must be either by an express grant in the constitution, or by its being incidental to some express power. As there is no express grant of this kind in the constitution, I inquire to what express power in the constitution is this incidental, or in other words, in what express grant is it implied as a necessary means of executing the express power? For there can be no contingent without a principal. It will not be pretended that it is incidental to any of the legislative or any of the executive powers delegated in the first and second articles of the constitution. Can it be derived from any of the powers of the judiciary, in the third article? And if so, which one? It has been already shown, that the *appellate power* of the Supreme Court conferred in this article, manifestly extends no further than appeals from the subordinate federal courts. And as to the provision which defines the subjects of the jurisdiction of the federal judiciary, it has been already shown that the jurisdiction of the federal courts is not made *exclusive;* and it is an undeniable fact, that since the origin of the government, the concurrent juris-

diction of the State courts over many of these subjects has been exercised, and universally conceded. By no rational implication, therefore, can it be deduced from this provision. Where, then, is this power to be found in the constitution? It cannot be derived from any of the miscellaneous provisions of article fourth, or the amendatory provision of article fifth. The second clause of the sixth article declares that the Constitution of the United States, and the laws made in pursuance thereof, shall be the supreme law of the land, and that the judges in every State shall be bound thereby; and the next succeeding clause requires of the officers of the State governments, an oath to support the constitution, &c. There is clearly nothing here, conferring upon the Supreme Court of the United States the important power in question. This mere declaration of the character and operative effect of the constitution, laws, &c., of the United States, is no grant of power. And it is admitted, that the constitution and laws of each State are equally the supreme law of the land within the sphere of their operation. Suppose an act passed by Congress, *not* in pursuance of the Constitution of the United States. It is not required to be regarded by the State judges as the supreme law of the land. Indeed, their oath to support the Constitution of the United States would require them to disregard it. But where is the provision of the constitution which makes the Supreme Court of the United States the exclusive arbiter, or tribunal of last resort, to determine whether the laws be made pursuant to the constitution or not? If this power be *necessary, and yet not delegated*, the constitution should be amended. A power of such grave import should not be exercised without a clear warrant for it in the constitution. It will not do to conclude that a power has been delegated by the constitution, simply because we may conceive it to be highly necessary and proper, when we are unable to find authority for it in the constitution.

But, it not only appears that the Constitution contains no provision giving to the Supreme Court of the United States, any such power, but it appears from the public records, that the convention which framed the constitution, positively refused to confer on

the federal government, any such supervisory power over the States. The proposition was made in the convention repeatedly, and in a great variety of forms, but in every instance, and every form in which proposed, it was finally defeated. The first project for a constitution submitted in the convention, was by Edmund Randolph, which proposed to vest this supervisory power in a national legislature. See Madison Papers, Vol. 2, p. 732. This was changed in the committee of the whole, to which Mr. Randolph's proposition was referred, and a provision reported, giving to the "national judiciary, jurisdiction of all questions which involve the national peace and harmony." Same vol. 861. Charles Pinckney's draft of a constitution submitted to the convention, contained a proposition, that "the legislature of the United States should have the power to revise the laws of the several States that may be supposed to infringe the powers exclusively delegated by this constitution to Congress, and to negative and annul such as do." Ibid. 745. On page 821 of this work, we learn that Mr. Pinckney made his proposition to vest this power in the national legislature, by motion, in committee of the whole. Pending the discussion of this proposition, Mr. Madison suggested lodging this power in the Senate alone, (page 827.) Mr. Hamilton's draft of a constitution, contained a proposition, providing by express declaration that all State laws, contrary to the constitution and laws of the United States, should be utterly void; and further, that the governor, or president of each State, should be appointed by the general government, with a negative upon all such laws at the time of their passage. Ibid. 892.

When, therefore, the constitution not only contains no provision, conferring upon the federal government this supervisory power over the States, but when the proposition to confer such a power was distinctly and repeatedly made in various forms in the constitution, and in every instance finally defeated, and when, on the adoption of the constitution, some of the States required an amendment to the constitution, which was agreed to, expressly providing, that all powers not delegated by the constitution, were reserved, with what fairness and sound reason, can the delegation of a power be insisted

upon, so important in its import, so controlling and absorbing in its operation, and so utterly destructive of the equality and independence essential to the very existence of co-ordinate powers. It is idle to speak of the two governments as being independent and co-ordinate, of each being supreme within the sphere of its own powers, if one has the exclusive power to determine all questions touching, not only the extent of its own powers, but also the extent of the powers of the other. Our system of government was established upon the principle of a division of political power, with a view to checks and safeguards to prevent its abuse. And it is a fair conclusion, that it was not the intention of those who ordained and established it, to vest discretionary or arbitrary power in any department of the government. It has been the boast and pride of this country, that our system of government, rested, not like the arbitrary governments of other countries, upon *physical power* but on an *enlightened public opinion*, on the *regard of the people for principle, right, and justice*, a practical concession of the right, and the capacity of the people for self-government. A philsophical principle was adopted, believed to be applicable to the political, as well as to the material world, that all organic action, whether of human or divine mechanism, is the result of the reciprocal action and reaction of the parts of which it consists, and capable of restricting its various powers to their appropriate spheres, and compelling the performance of their respective functions. This was accomplished by a division of political power, and calling into operation checks and safeguards against its abuse, by the mutual action and reaction of the various departments upon each other. And in regard to the most important power of government, that of the *supreme power*, which according to all experience, had never failed in other countries and ages, to overleap all the barriers and restraints of human contrivance, two equal and co-ordinate governments, State and federal, were established, each equally supreme within its appropriate sphere of action; and *as to the boundary which separates their powers, and limits their extent, a mutual check upon each other.* This made each the protector of the powers assigned to it, and of which, it is the organ and the

representative. Without this mutual check, or power of each, to restrain the other to its appropriate sphere, the stronger would finally absorb the supremacy of the weaker, and concentrate all power in itself.

That collision or conflict of these co-ordinate powers might arise, was not beyond anticipation. That is an occasional incident of every division of power, whether it be that of co-ordinate departments, co-ordinate estates or classes, co-ordinate governments, or any other division of powers appertaining to government. It is one of the evils to which constitutional government based on a division of powers must be always to some extent exposed. But we have to take things as they are, with all their incidents, good or bad, as perfection is not to be found in human institutions, and the choice is between a constitutional government of limited powers, and an absolute government exposed to all the oppressions and abuses incident to uncontrollable power. In case of collision or conflict of authority between these two co-ordinate governments, neither can claim by the Constitution the exclusive and arbitrary power of determination, and of enforcing its decision by physical power. If a single State had the power *sua sponta*, to nullify a law of the United States, and arrest its operation by its own act, that would destroy the independence of the federal government as an equal and co-ordinate power with that of each State. The federal government and that of the several States being each supreme within their respective spheres of action, are clothed each with authority to enforce the execution of its own laws. But in case of conflict between the authorities of the two governments in the execution of their respective powers, the controversy will ordinarily give rise to a question which would go before the judicial tribunals. If it arise in a case over which the State courts have exclusive jurisdiction, their determination will be final and conclusive as to the parties in the case; if in a case over which the federal courts have exclusive jurisdiction, their determination will be final. But if the question arise in a case over which the courts of the two governments have concurrent jurisdiction, the determination of the courts of that in which the jurisdiction first attached must be final and conclusive

upon the parties in the case. In case the principle settled in the State courts be wholly inconsistent and irreconcilable with that settled in the federal courts, and from this conflict of decision or otherwise a conflict of authority in the execution of the laws ensue, the adjustment of the difficulty must be transferred from the delegated trusts of civil authority to the sovereign power resting in the people of the several States. If this sovereign power, acting through the ballot box, not only upon legislation, but also upon the executive and the judicial powers of the two governments, fails to supply the requisite corrective, there remains the further remedy of amending the Constitution. These are the peaceable remedies provided by the Constitution. If these all fail, if notwithstanding appeals to public sentiment, remonstrance and negotiation with all proper forbearance, the federal government for example, should recklessly persist in a course of usurpation of power utterly destructive to the independence and sovereignty of the States, there could remain no course but a resort to the *original rights* of the people of each State as an independent community.

It has been supposed by some, that inasmuch as the supreme judicial power of the United States was controlled by great and good men, and learned experienced jurists, there could be no danger of entrusting the determination of all controversies touching the extent of the powers of the two governments to their judgment and discretion. Although this is not strictly pertinent to the question of the competency of the power, yet it may be remarked that the highest moral obligations,—truth, justice, and plighted faith, have never furnished a safe and certain barrier against the abuse of power,—that when entrusted with arbitrary power, human nature has very rarely been found proof against the shifts and devices of cupidity and ambition. No man has a higher respect, and indeed greater veneration than I have for the great and good men who have adorned the Bench of the Supreme Court of the United States. Ohio is now and has been for many years honored with one of her most illustrious citizens on that Bench, in whose integrity and elevated purity of character all have confidence. It is known full well that he would not willingly abuse any trust of civil power, and there

is no man living to the rectitude of whose intentions I would sooner trust arbitrary civil power than to him. But infallibility of judgment is not an attribute of human nature, and when we reflect on the errors into which man has been lead in the exercise of arbitrary power in other ages and countries, alas! how much is there to humble man in the pride of his boasted intellectual and moral elevation.

It is urged that some authority is absolutely necessary as the supreme and final arbiter of all conflicts of power, between the federal government and the several State governments. If this be true, it is an argument in favor of an amendment of the Constitution, rather than an assumption of power by the federal government. A *supposed necessity* will not warrant an assumption of power not to be found in the Constitution. If a supreme and final arbiter to determine all questions of conflict of power between the federal and State governments, be *necessary*, it should belong *exclusively* neither to the federal, nor to the State governments, but it should be an *intermediate power*, selected by the consent of *both*, and under the *exclusive* control of *neither one*. This would leave the federal and the several State governments *equal* and *co-ordinate* governments, each a salutary check upon the other, in any attempt to exercise an unwarranted power.

We humbly conceive that the independent co-ordinate authority of the several States as a check upon the general government, is a matter of great and essential importance to the safety and purity of our institutions; and that, if the arbitrary power be conceded to the federal government to determine all controversies touching not only its own powers, but also those involving the powers of the several States, it must subvert the whole theory and structure of our government, and result in a consolidated national government.

At the time of the adoption of the Constitution of the United States, it was insisted by many, that it was necessary to fortify the powers of the federal government against the powers and influence of the States; that the States would form combinations against the federal government, and that the weakest point in our system of government was a tendency to dissolution. The practical operation

of the system has shown the utter fallacy of this opinion. The separate and distinct interests, local attachments, and rivalries between several States, have counteracted all tendency to form combinations of this kind. And in almost every instance which has occurred, of a conflict between the powers of a State and the federal government, the contest has been a most unequal one, for the State has had a struggle, not only against the powers and influence of the general government, but also against a combination of the other States, uniting their power and influence with that of the general government. It is manifest that an element has entered into the operations of our system of government, not fully anticipated at the time of its formation. The vast patronage and extensive emoluments of the general government has become an all-engrossing object of attention, and concentrated a power and influence which enable the federal government to bring to its aid not only organized combinations of the people, but also combinations of the greater part of the States.

It was supposed by the framers of the Constitution, that the powers of the federal government would be held in check by the popular elections. The practical operation of the system, however, has demonstrated the utter fallacy of this expectation. The change of administrations and officers under the federal government, as a general thing, seems to have had but little effect, other than to bring a fresh supply of persons into power, who struggle with renewed vigor and increased recklessness for their various purposes of ambition, cupidity aud aggrandizement.

The persons in the service and interest of the federal government, throughout the vast expanse of country from the Atlantic to the Pacific, upon the high seas, and in foreign countries, must exceed two hundred and fifty thousand in number; and the dependants and aspirants, who are expecting to profit by the powers of the federal government, are more than five times that number. Besides this, the extensive power and influence of the associated wealth of the country, under the special privileges and immunities of corporations, have become, by means of the adjudications of the federal judiciary, attached to the supremacy of the federal government, by the all-controlling tie of self-interest. With such an accumulation

and concentration of interests and influence, the federal government, collecting and disbursing annually a revenue of from sixty to eighty millions of dollars, with the entire control of all the military and naval forces, of all the military fortifications and munitions of war throughout the country, wields a power surpassed by but few governments in the world.

With its immense resources, vast patronage and extensive emoluments, concede to the federal government, the constructive powers to the full extent claimed for it, unchecked by the co-ordinate powers of the several States, and nothing short of a revolution, can prevent its becoming absolute.

The doctrine of the Supreme Court of the United States, announced in the cases of *M'Culloch* vs. *Maryland*, *Osburn* vs. *The Bank of the United States*, *Cohens* vs. *Virginia*, and other cases, invests Congress with discretionary power of the most extraordinary character, derived from inference and implication. It is not required that the *purpose* of the measures adopted as a means to carry into execution the express powers, should have this *exclusively*, or indeed, *mainly* in view. It is sufficient, according to this doctrine, to sustain the constitutionality of a measure, if the execution of an express power be a mere incident to a measure, designed to effectuate other immediate and ulterior objects however great in their *consequences*. For example, in the case of *M'Culloch* vs. *Maryland*, the constitutionality of the Bank of the United States was sustained as among the implied powers of Congress. The *main object* of this measure was of course, the investment of the private capital of persons in the business of banking, lending money, discounting bills, receiving money on deposit, and issuing bank notes for circulation. This of itself, it was not pretended, that Congress had the power to authorize. But inasmuch as the bank could be *incidentally* used, as a place for the deposit and safe keeping of the money of the government, therefore, this measure most important for other purposes, was sustained as among the means selected by Congress for the execution of the express powers of the government: and not only so, but the extensive investments of private property in the stock of this institution, in the several States, was declared to be withdrawn

from the sovereign power of taxation by the States, because the bank was thus incidentally used by the federal government. Under the simple power, "to *establish* post offices and post roads," the authority has been claimed not only to *construct* roads, but to make canals, and engage in a general system of internal improvements in the states. And under the power "to raise and support armies," with a view to the transportation of supplies and the munitions of war, the authority has been claimed to engage, even, in the construction of rail roads in foreign countries. A less violent implication would enable the federal government to provide for a system of military espionage in every city, hamlet or neighborhood throughout the country. By such stretch of authority, by way of implication, inference, or construction, what stupendous scheme of aggrandizement, and enlargement of its powers, may not the general government embark in and sustain its constitutionality on the ground that it *incidentally*, or *in some way* aids or can be used as a *means* to aid in carrying into execution some of the express powers of the government, although the *chief* and *main purpose* of the measure, be an entirely different and ulterior object.

With this doctrine of constitutional construction established, concede to the federal government, the power to determine in the last resort, all controversaries touching, not only the extent of its own powers, but also, the boundaries of the powers between the several States, and the federal government, and all the safeguards and limitations of the express provisions in the constitution would be easily overcome by the ingenious devices of implication and construction. The ultimate result, would be inevitable. The States would be stripped of their sovereignty and independence, and the federal government become, in effect at least, a consolidated, national government, concentrating all supremacy in itself. Civil power thus uncontrolled and absolute, in a government, so extensive in its operations, and with means and resources so vast as those of the United States, would eventuate in the long train of abuses and oppressions which have never failed to follow in the course of arbitrary civil power.

It is clear, that it was not contemplated at the time of the forma-

tion and adoption of the constitution, that any such exorbitant powers were to be conferred on the federal government; and by a strict and fair construction of the constitution, no such powers can be maintained.

From the foregoing views, the following conclusions are deduced:

1st. That the provision of the constitution of the United States expressly conferring appellate jurisdiction on the Supreme Court, does not authorize the exercise of appellate power by that tribunal, over the state courts, but extends simply to appeals from the subordinate federal courts.

2d. There is no provision in the constitution, from which, a supervising power in the Supreme Court of the United States, over the state courts, can be derived by way of incident or implication.

3d. The Supreme Court of the United States, has not been constituted the exclusive tribunal of dernier resort, to determine all controversies in relation to conflicts of authority between the federal government and the several states of the American Union.

4th. That the State courts and the federal courts are co-ordinate tribunals, having concurrent jurisdiction in numerous cases, but neither having a supervising power over the other; and that, where the jurisdiction is concurrent, the decision of that court, or rather, of the courts of that judicial system, in which the jurisdiction first attaches, is final and conclusive as to the parties.

The Supreme Court of the United States, therefore, not being authorized by the constitution to exercise appellate jurisdiction over the judgments of this court, there can be no authority for the entry upon our journals sought by the motion before us. To allow the entry to be made in order to remove the cause to the Supreme Court of the United States for action by that tribunal, which would be in violation of the constitution which we have sworn to support, would be a dereliction of duty upon our part.

Motion overruled.